No. 90-479

IN THE

Supreme Court of the United States

October Term, 1990

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE and JOHNANN ADEE, his wife; HOWARD W. ROBERTSON and PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE and DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNN HEIMANN, deceased, JAY DEE HEIMANN, GENE ALVIN HEIMANN and RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; and JOHNANN ADEE, in her capacity as Personal Representative of THE ESTATE OF FRED P. HEIMANN, deceased,
Petitioners,

v.

AMOCO PRODUCTION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September 10, 1990

QUESTIONS PRESENTED FOR REVIEW

1. For determining whether an administrative agency "acts in a judicial capacity" for purposes of applying federal rules of issue preclusion, do this Court's decisions in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) and its progeny state the applicable standard or, as the court of appeals held, is the issue to be decided under general principles of state law?

2. Does the Full Faith and Credit Act, 28 U.S.C. § 1738, require a federal court to give collateral estoppel effect to actions of state administrative agencies acting in a legislative capacity, simply because those actions were affirmed after traditional appellate review in a state court?

3. Is the lower court's decision, which allows fact-finding by an administrative agency to foreclose the exercise of one's Seventh Amendment right to a jury trial in federal court on a matter involving only private rights, inconsistent with *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___ , 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)?

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*Amoco Production Company is a wholly-owned subsidiary of Amoco Corporation (formerly Standard Oil Company of Indiana).

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OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at *Amoco Production Co. v. Heimann*, 904 F.2d 1405 (10th Cir. 1990), and attached as Appendix A.

JURISDICTION

The original opinion of the Tenth Circuit was dated and entered on April 6, 1990. Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on April 20, 1990. The Tenth Circuit amended its opinion on May 24, 1990 (Appendix A), but in all other respects denied the motion for rehearing. (Appendix G). Petitioners filed a second Petition for Rehearing from the amended opinion on June 7, 1990. The Tenth Circuit denied that Petition for Rehearing on June 12, 1990. (Appendix H).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provision and statutes are involved in this case:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
>
> *United States Constitution, Amendment 7.*
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

STATEMENT OF THE CASE

Petitioners, the Heimanns, are a family of cattle ranchers living and conducting their operations in New Mexico. They own approximately 48,000 acres of land in which they hold mineral rights. Underlying Petitioners' lands are large reserves of carbon dioxide (CO_2).

Respondent, Amoco Production Company ("Amoco"), engages in the production of oil. At the material times, it had interests in certain oilfields in West Texas and desired to produce CO_2 in New Mexico, to transport it by pipeline to those oilfields, and to use it to enhance oil recovery there.

Between 1971 and 1974, the Heimanns and Amoco entered into three mineral leases by which Amoco was granted the authority to produce CO_2 from the Heimanns' lands. Amoco entered into similar leases with over one thousand other landowners in the

adjoining areas. The Heimanns' leases with Amoco, and many of the other leases, contained a "unitization clause" which provided, in effect, that Amoco had the authority to unitize the Heimanns' leases with other leases, subject to the approval of "any governmental authority." To "unitize" is to operate a collection of leases as if it were a single lease. Through an implied covenant arising from a mineral lease, the common law imposes upon the lessee a duty of good faith in favor of the lessor, requiring lessee to take into consideration the effect on the lessor's interest in the exercise of the authority to unitize. (Appendix A, pp. 6-10). *See also, Phillips Petroleum Co. v. Peterson,* 218 F.2d 926 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955).

In the late 1970's, Amoco desired to unitize the Heimanns' leases with other leases. To that end, it formed a proposed unit which it called the "Bravo Dome" unit, encompassing over 1,800 individual tracts or properties (Amoco's Brief in Chief, p. 12, n. 6) and consisting of a total of over 1,100,000 acres. This unit was probably the largest unit ever formed in the United States. (Appendix C, p. 4).

The Heimanns' leases required Amoco to pay them according to the actual production from their leases. Although Amoco knew how to draw a plan for operating the unit, called a "unit agreement," which accounted to each lessor in the unit for the actual production from his own lease, Amoco unilaterally drew the Bravo Dome unit agreement to account to each lessor according to the number of acres in each lessor's lease compared to the total mineral acres in the whole unit. In other words, Amoco decided to pay the lessors on the basis of acreage rather than production.

Amoco implemented its "unit agreement" in two ways: (1) it approached individual lessors in the unit asking them to ratify it, and (2) it sought approval of it from several governmental agencies. Some lessors did ratify the unit agreement. Others, including the Heimanns, did not.

In 1978, to obtain the agency approval called for under the leases, Amoco filed a request for "preliminary approval" of its proposed unit agreement with the New Mexico Oil Conservation Commission ("OCC"). (Exhibit 17). That request was not sent to the Heimanns or other lessors. On July 21, 1980, the OCC held a

one-day hearing on the request and, on August 14, 1980, entered an Order approving the Bravo Dome unit agreement. In relevant part, the Order provided,

> (2) That the plan contained in said unit agreement for the development and operation of the unit area is hereby *approved in principle as a proper conservation measure*; provided, however, that notwithstanding any of the provisions contained in said unit agreement, this approval shall not be considered as waiving or relinquishing, in any manner, any right, duty, or obligation which is now, or may hereafter be, vested in the Division to supervise and control operations for the exploration and development of any lands committed to the unit and production of carbon dioxide gas therefrom.
>
> . . . .
>
> (4) That *all plans* of development and operation and *all expansions or contractions* of the unit area *shall be submitted* to the Director of the Oil Conservation Division *for approval.*
>
> . . . .
>
> (5) That *jurisdiction* of this cause *is retained for* the entry of such *further orders* as the Commission may deem necessary.

(Appendix B, p. 2). (Emphasis added).

The OCC also found that approval of the unit agreement "should promote the prevention of waste and the protection of correlative rights." (Appendix B, p. 2).

A few days later, a group of 238 lessors, including the Heimanns, filed an application for rehearing on the OCC order. Pursuant to that application, another one-day hearing was held in October of 1980. At that proceeding, the lessors were represented by an attorney, evidence was admitted and witnesses were examined and cross-examined.

In January of 1981, the OCC entered a second order (Appendix C) which contained the following pertinent findings:

> (7) That on October 9, 1980, a rehearing was held in Case No. 6967 for the purpose of permitting all interested parties to appear and present evidence relating to this matter, ...

(13) That the developed acreage within the proposed unit is very small when compared to the total unit area and when viewed as a whole, *the unit must be considered to be an exploratory unit.*

. . . .

(16) That there was *no evidence* upon which to base a finding that either [of two proposed methods of distribution of production or proceeds from production] was clearly superior upon its own merits in this case *at this time.*

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate *at this time.*

. . . .

(22) That this is the largest unit ever proposed in the State of New Mexico, and perhaps the United States.

(23) That there is no other carbon dioxide gas unit in the State.

(24) That *the Commission has no experience* with the long term operation of either a unit of this size or of a unit for the development and production of carbon dioxide gas.

(25) That the evidence presented in this case establishes that the unit agreement *at least initially* provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

(26) That the *current* availability of reservoir *data* in this large exploratory unit *does not now permit the presentation of evidence* of the finding that the unit agreement provides *for the long term development of the unit area* in a method which will prevent waste and which is fair to the owners of interests therein.

(27) That *further development* within the unit area *should provide the data* upon which such determinations could, from time to time, be made.

(28) That the Commission is empowered and has the duty with respect to unit agreements to do whatever may be reasonably necessary to prevent waste and protect correlative rights.

(29) That the *Commission* may and should *exercise continuing jurisdiction* over the unit relative to all matters given it by law and take such actions as may, *in the future*, be required *to prevent waste and protect correlative rights* therein.

(Appendix C, pp. 2-4). (Emphasis added).

Based on those findings, the OCC again approved the Bravo Dome unit agreement subject to the same conditions and qualifications contained in the earlier order and the following additional conditions:

(4) That the *operator* of said unit *shall be required to periodically demonstrate* to the Commission *that its operations* within the unit are resulting in the *prevention of waste and protection of correlative rights on a continuing basis*.

(5) That such demonstration shall take place at a public hearing held *at least every four years* following the effective date of the unit or at such lesser intervals as the Commission may require.

(Appendix C, p. 6). (Emphasis added).

The lessors, including the Heimanns, appealed that January 21, 1981, Order to the New Mexico district court. The OCC was named as a party to the appeal because, under New Mexico law, its decision was one in which it was acting "legislatively", and it was a necessary party because it had a duty to protect and to represent the public interest. *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809, 818-819 (1962). In that appeal, the court sat in a review capacity having only the authority to review the administrative record, and the only issues before it were: (1) had the OCC acted outside of its scope of authority and (2) were its findings supported by substantial evidence? *Rutter & Wilbanks Corp. v. Oil Conservation Commission*, 87 N.M. 286, 532 P.2d 582 (1975). *See also*, Section 70-2-25, NMSA 1978. On the appeal, the district court affirmed the order of the OCC, as did the New Mexico Supreme Court. (Appendices D and E).

In 1984, Amoco began production of carbon dioxide in the Bravo Dome unit, and the Heimanns' leases were among those from which production occurred. Even though the Heimanns had refused to ratify the unit agreement, Amoco treated their leases as if they were included in the unit. Over the next several years, the production from the Heimanns' leases represented 13% of Amoco's total production from the unit. However, Amoco paid them on only 3.6% of the total production from the unit because the Heimanns owned only 3.6% of the mineral acres in the whole unit. The difference between the royalties which would have been payable on actual production from the Heimanns' leases between 1984 and the time of trial and the royalties paid by Amoco during that time was approximately $3,500,000.00.

In 1984, Amoco sued the Heimanns in the United States District Court for the District of New Mexico seeking a declaratory judgment that their unitization was proper and an injunction against the Heimanns forcing them to ratify the unit agreement. Jurisdiction was based on diversity of citizenship of the parties. 28 U.S.C. § 1332. The Heimanns were all citizens of New Mexico, and Amoco was not. The Heimanns counterclaimed alleging, among other things, that Amoco had breached the implied covenant of good faith arising from the mineral leases, at least from 1984 to the time of trial, by failing and refusing to give appropriate consideration to the interests of the Heimanns in planning and implementing the unit. The Heimanns sought money damages arising from that breach, demanded a jury trial, and sought declaratory relief and an injunction requiring Amoco to withdraw the Heimanns' leases from the unit and to pay them on the actual production from their leases.

In December of 1987, the damage claim was tried for two weeks to a jury. The jury returned a verdict for the Heimanns awarding them $3,500,000.00 in compensatory damages and $500,000.00 in punitive damages. Thereafter, the trial court entered a judgment on the jury verdict and findings of fact and conclusions of law in favor of the Heimanns on the equitable issues. (Appendix F). The court found, among other things, that Amoco knew that the CO_2

reserves beneath the Heimanns' properties were superior in reservoir quality and quantity to those reserves lying under most other properties in the unit, withheld that information from them, knew how to draw and to implement a unitization plan which fairly accounted for the differences in quality of reservoir and quantity of reserves as to the different leases, but refused to implement a fair plan in that regard, and acted in bad faith in including the Heimanns' leases within the unit. Accordingly, it ordered Amoco to remove the Heimanns' leases from the unit. The court also held that,

> The fact that Amoco obtained the approval of the New Mexico Oil Conservation Division does not establish that the Unitization agreement and the tract participation formula was fair to counterclaimants.

(Appendix F, p. 5).

In making that ruling, the trial court relied heavily on the decision of the Tenth Circuit in *Amoco Production Co. v. Jacobs*, 746 F.2d 1394 (10th Cir. 1984), in which it held that the same approval order from the OCC "does not in and of itself result in the conclusion that [the unit agreement] was valid [and] cannot. . .establish that the area is fair to the owners of interest therein." *Id.*, at 1403.

Amoco appealed both the judgment entered on the jury verdict and the judgment granting declaratory and injunctive relief. On appeal, as at trial, Amoco argued that the approval of the Bravo Dome unit agreement by the OCC was entitled to collateral estoppel effect in the federal lawsuit and conclusively established that Amoco had not breached its common law duty of good faith to the Heimanns. The Heimanns responded with the arguments, among others, that (1) no collateral estoppel effect could be afforded to the OCC approval order because it was acting in a legislative capacity and not a judicial one, and (2) giving preclusive effect to the OCC order would deprive them of their right to a jury trial.

The Tenth Circuit recognized that Amoco did indeed have a common law duty of good faith towards the Heimanns under the unitization clause in the leases. However, it overruled its prior decision in *Amoco Production Co. v. Jacobs, supra*, and held that

where a state agency is empowered to rule on the fairness of a unitization plan and finds that such a plan adequately protects the correlative rights of all interested parties, that approval is conclusive in any subsequent litigation between any of the parties on the common law issue of good faith. (Appendix A, p. 13). The court then turned to the question whether the OCC was such an agency. It held that the question turned on whether, under New Mexico law, the OCC acted in a judicial capacity when it granted Amoco's application for approval of the Bravo Dome unit agreement. It based its ruling on the "trial-like procedures" which were available and employed in the one-day hearing on the lessors' application for rehearing before the OCC. (Appendix A, p. 17). Based upon that determination of judicial capacity, the court held that the Heimanns were bound by the OCC's determinations in 1980 and 1981 in connection with Amoco's "preliminary approval" application. Accordingly, the court of appeals reversed both the judgment entered on the jury verdict and the trial court's judgment granting declaratory and injunctive relief and directed that judgment be entered for Amoco.

The Heimanns petitioned for rehearing and suggested rehearing *en banc* because the court had overlooked decisions of this Court such as (1) *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), which state the standard for deciding when an administrative agency was acting in a "legislative," rather than a "judicial," capacity for purposes of issue preclusion and (2) *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___ , 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), defining the Seventh Amendment's limitations on relegating the adjudication of disputes involving only private rights to non-Article III bodies acting without a jury. In response to that petition, the Tenth Circuit amended its opinion (but not in any way material to this Petition) and otherwise denied the petition for rehearing. (Appendix G). The Heimanns' petition for rehearing from the amended opinion was also denied. (Appendix H).

A. In Applying The Federal Common Law Of Issue Preclusion, The Tenth Circuit And Other Lower Courts Have Not Followed *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), And Its Progeny Holding That The "Final Act" Of The Administrative Agency Determines Whether It Acts In A Legislative Or Judicial Capacity.

This Court has defined the circumstances under which determinations by administrative agencies will be given preclusive effect in federal court. That test was announced in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), carried forward in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 n. 26 (1982), and stated as follows in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986):

> [W]e hold that when a state agency "acting in a judicial capacity. . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *United States v. Utah Construction & Mining Co., supra*, 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

Id., at 799.

This test, which we will call "the *Utah* test," has been recognized to contain three distinct elements, each of which must be met before an administrative determination will be given preclusive effect in a federal court: (1) the agency must have been acting in a judicial capacity, (2) the parties must have an adequate opportunity to litigate the question, and (3) the courts of that particular state would give the agency's determination preclusive effect. *See, Kirkland v. City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987).

Whether the agency is acting in a "judicial capacity" constitutes a federal question as part of the "federal common-law rules of preclusion" announced in *Elliott*. *Id.*, at 799. *See also, St. Bartholomew's Church v. City of New York*, 728 F.Supp. 958, 965 n. 15 (S.D.N.Y. 1989). If a particular state should also require that the

agency be acting in a judicial capacity in order for its own courts to give preclusive effect to such decisions, then the same question may arise again, under state law, in connection with the third part of the *Utah* test. However, in the first instance, whether an agency is acting in a "judicial capacity" for purposes of applying rules of preclusion in federal courts is an issue of federal law.

Under the facts of *Utah*, *Kremer*, and *Elliott*, there was no need to elaborate in those opinions on what it meant by the requirement of "judicial capacity." That requirement was not a disputed issue in those cases.[1] Accordingly, this Court has not yet explained what "acting in a judicial capacity" means in applying administrative collateral estoppel in federal courts. The Tenth Circuit, in the absence of that guidance, confused that element with the second and third elements of the *Utah* test. It focused on the "trial-like procedures" at the administrative level, a review pertinent to whether the parties had been afforded administrative due process. It also erroneously presumed that it was anticipating the New Mexico Supreme Court's answer on when the OCC was "acting in a judicial capacity". Continuing with that presumption, it concluded, absent such authority in New Mexico, the issue had to be resolved by "consult[ing] general principles of preclusion." (Appendix A, p. 13). However, the Tenth Circuit did not recognize that the issue of when an agency is "acting in a judicial capacity" constitutes a federal question in the first instance and one which has been repeatedly decided by this Court.

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[1] In *Utah*, the agency was the Advisory Board of Contract Appeals, which was given the specific statutory authority under the Wunderlich Act to render final and binding adjudications of contract claims between the United States and its contractors. In *Kremer*, the agency was the New York State Division of Human Rights which had the specific New York statutory authority to adjudicate claims of individual discrimination in employment and which found that there was no probable cause to believe that the employee had been the victim of discrimination. In *Elliott*, the agency was a state university acting through an administrative law judge, and it found that the employee had not been the victim of employment discrimination (although the Court did not reach the issue of whether the *Utah* elements had been met). In each of these cases, the proceeding was one which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis v. Atlantic Coast Line Co., supra.*

In the absence of guidance, the Tenth Circuit overlooked a long and healthy line of decisions from this Court which articulate the standards for distinguishing a "legislative" proceeding from a "judicial" proceeding. The leading case is *Prentis v. Atlantic Coast Line Co., supra*, in which certain railroads filed suit in federal court seeking to challenge and enjoin the enforcement of rates set by orders of the Virginia State Corporation Commission. The issues were (1) whether the state commission could be enjoined in light of the statute prohibiting injunctions against "proceedings in any court of a State,"[2] (2) whether the decision of the commission made the legality of the rates res judicata, and (3) whether the current challenge was premature. The resolution of the first two questions turned on whether the administrative proceedings were "judicial proceedings" for purposes of interpreting the statute and applying res judicata.

In an opinion by Justice Holmes, this Court distinguished between "legislative" and "judicial" proceedings.

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Id. at 226.

He then observed that hearings and investigations into existing factual matters are common to both judicial and legislative proceedings and, therefore, cannot be used to distinguish one from the other.

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[2] The statute at issue, Rev. Stat. § 720, was originally enacted as Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334. *See, Roudebush v. Hartke*, 405 U.S. 15, 20 n. 11 (1972). The current version of that statute is 28 U.S.C § 2283, commonly known as the "Anti-Injunction Act." *Id.*

> Most legislation is preceded by hearings and investigations. But the effect of the inquiiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . . .The *nature of the final act determines the nature of the previous inquiry.*

Id., at 227. (Emphasis added).

In that case, for example, this Court held that the administrative proceedings were *legislative* even though, as the dissent pointed out, the hearing lasted for several months and consisted of the introduction of evidence by the parties opposing the rates, the examination and cross-examination of witnesses, and the opportunity to object to the introduction of evidence. The procedures which lead up to the final act were indistinguishable from court proceedings. Yet, the nature of the final act determined the nature of the proceedings as "legislative."

Finally, the Court held that an administrative proceeding legislative in nature does not change its character when appealed through the state courts.

> And all that we have said would be equally true *if an appeal had been taken to the supreme court of appeals and it had confirmed the rate*. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called.

Id., at 227. (Emphasis added).

Accordingly, it held that the proceedings before the Virginia Corporation Commission were legislative in character and, therefore, not "proceedings in any court" within the meaning of the Anti-Injunction Act. Moreover, since the administrative decision resulted from the Virginia Corporation Commission acting in a legislative capacity rather than a judicial one, the decision was not entitled to res judicata effect on the issues raised. On the issue of prematurity, the Court held that the parties should exhaust any

available state remedies by seeking appellate review in the Virginia courts before invoking the aid of the federal court. However, the Court made clear that if the rate was affirmed by the state appellate courts, the parties could proceed in federal court "without fear of being met by a plea of *res judicata*." *Id.*, at 230.

In this Court's revisiting the same issue over the years, the *Prentis* test for distinguishing "legislative" from "judicial" proceedings has endured.[3] Just last year, this Court strongly reaffirmed *Prentis* in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, ___ U.S. ___ , 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). In that case, this Court held, without dissent, that the *Younger* abstention doctrine did not require a federal court to abstain from hearing a challenge to a state agency decision, even though that administrative decision was on appeal through the state courts. In the majority opinion authored by Justice Scalia, this Court cited and quoted extensively from *Prentis* on the distinction between "legislative" and "judicial" proceedings before administrative agencies (*Id.*, 109 S.Ct. at 2519), after which it said,

> We have since reaffirmed both the general mode of analysis of *Prentis* [*citing, District Court of Appeals v. Feldman, supra*], and its specific holding that ratemaking is an essentially legislative act. (Citation omitted).

Id., 109 S.Ct. at 2519-2520. *See also*, the concurring opinion of the Chief Justice citing "our long-standing characterization of the distinction between "judicial" and "legislative" proceedings, see *Prentis v. Atlantic Coast Line Co.*, ..." *Id.*, 109 S.Ct. at 2521.

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[3] *District Court of Appeals v. Feldman*, 460 U.S. 462, 476-479 (1983) (determinations in bar admission matters, albeit by a court, are "legislative," not "judicial" proceedings for purpose of appealability to this Court, quoting *Prentis*); *Roudebush v. Hartke*, 405 U.S. 15, 20-23 (1972) (statutory election recount procedure, albeit conducted by a court, is not a proceeding in a court for purposes of the current Anti-Injunction Act, 28 U.S.C. § 2283, quoting *Prentis*); *Public Service Co. of Northern Illinois v. Corboy*, 250 U.S. 153 (1919) (a state court's approval of plans and supervision of construction of a drainage ditch, upon application of property owners, is not a judicial proceeding for purposes of the Anti-Injunction Act, citing *Prentis*).

What is lacking and greatly needed is a decision by this Court wedding the *Prentis* line of cases establishing the "final act" test for distinguishing legislative from judicial proceedings with the element of "acting in a judicial capacity" laid down in cases such as *Utah*, *Kremer*, and *Elliott*.

In the absence of some direction by this Court, lower courts have applied neither the *Prentis* test to the element of "acting in a judicial capacity," nor any other test with consistency or uniformity. In this case, the "final act" of the OCC was (a) a preliminary approval of the unit agreement; (b) a determination that the unit agreement was "fair" at that time (1980-1981) and that more evidence was needed to determine the fairness of the agreement in the future; and (c) an order directing Amoco to demonstrate the fairness of the unit agreement at regular intervals in the future. That "final act" determines this proceeding before the OCC to be legislative. The Tenth Circuit applied the wrong standard, contrary to the *Prentis* test, and reached the opposite conclusion.

The Seventh Circuit has held administrative proceedings to be "judicial" within the meaning of the *Utah* test where they "were conducted in the same manner with the same safeguards (hearings) as a trial in Illinois state court." *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 820 F.2d 892, 896 (7th Cir. 1987).

The Eighth Circuit has turned to Section 83 of the *Restatement (Second) of Judgments* for the proper standards on this question. *Yancy v. McDevitt*, 802 F.2d 1025 (8th Cir. 1986). However, that section expressly applies to "administrative adjudications" and, therefore, necessarily *presupposes* that the agency was acting in a "judicial" capacity. The criteria in that section, we submit, are more properly considered on the second element from *Utah*, that is, whether the litigants had an adequate opportunity to litigate the issue before the agency.

The Ninth Circuit has applied different tests at different times. *Compare, West Coast Truck Lines, Inc. v. American Industries, Inc.*, 893 F.2d 229 (9th Cir. 1990) (agency acted judicially "[b]y conducting a hearing, allowing the parties to present evidence and

ruling on a dispute of law." *Id.*, at 235), with *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) (agency acting judicially "because its decision required it to apply a rule to a specific set of existing facts." *Id.*, at 1283).

The Sixth Circuit has held an agency to be acting judicially "when it hears evidence, gives the parties an opportunity to brief and argue their versions of the facts, and the parties are given an opportunity to seek court review of any adverse findings." *Nelson v. Jefferson County*, 863 F.2d 18, 19 (6th Cir. 1988), *cert. denied*, ___ U.S. ___ , 110 S.Ct. 76, 107 L.Ed.2d 42 (1989). A leading commentator has stated that

> the determination of when [an agency is acting in a judicial capacity for preclusion purposes] cannot always be readily discerned; indeed, that question remains troublesome,
>
> . . . .

4 K. Davis, *Administrative Law Treatise* § 21.2, p. 49 (2d ed. 1983). However, even that commentator has overlooked this Court's *Prentis* line of decisions on this issue.

Of the three elements in the *Utah* test, the most important element is arguably this element of whether the agency is "acting in a judicial capacity." If the proceeding is not adjudicative, then no rights, duties or liabilities arising from past or present facts are being decided. The proceeding might establish a right or duty governing future events but, necessarily, it cannot determine whether those rights or duties are breached in the future. Accordingly, in legislative proceedings, it is irrelevant what opportunities for the presentation of evidence or examination of witnesses might be available. Even more irrelevant is the opportunity for judicial review. Since there is no adjudication at the administrative level, there certainly is no adjudication at the appellate level where the proceeding is one of judicial review on the record without presentation of any evidence. The issue whether rights or duties have been breached is simply not present.

As this Court has said in discussing collateral estoppel,

> Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once.

University of Tennessee v. Elliott, supra, at 798 n. 6, *quoting* K. Davis, Administrative Law Treatise, § 21.9, p. 78.

While the inner logic of collateral estoppel is unquestionably satisfying, the application of it to legislative proceedings is rather shocking. While the proper application of collateral estoppel prevents one who has received one adjudication from seeking another, the application of that doctrine to legislative proceedings prevents one from receiving any adjudication whatsoever. It bars one from any judicial forum. It defeats substantive rights.

Accordingly, this Court should grant this petition to clarify that its well-established standard for distinguishing "legislative" from "judicial" proceedings applies in determining whether fact-finding in state administrative proceedings are entitled to preclusive effect in federal courts under federal common law rules of issue preclusion.

B. Whether Legislative Determinations By State Administrative Agencies, Even After Affirmance By State Appellate Courts, Are "Judicial Proceedings Of Any Court" Within The Meaning Of 28 U.S.C. § 1738 Is An Important Question Which Was Left Open In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), And Should Be Decided Now.

The Full Faith and Credit Act, 28 U.S.C. § 1738, does not apply to a decision of an administrative agency because such a decision does not arise from "judicial proceedings of any court" within the meaning of that statute. *University of Tennessee v. Elliott, supra.* However, in *Kremer v. Chemical Construction Corp., supra*, the Court held that the decision of the New York Supreme Court,

Appellate Division, affirming a decision of the Appeal Board (which had affirmed a decision of the New York Division of Human Rights) was entitled to preclusive effect as a decision of a court within the meaning of 28 U.S.C. § 1738. However, the agency in *Kremer* was unquestionably acting in a "judicial capacity" under any reasonable test. The final act of the administrative body in that case was a determination that there was no probable cause to believe that the employee had been the victim of discrimination. It was a classic example of a judicial proceeding, that is, one which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis, supra*, at 226. *See also, Candelario v. Postmaster General*, 906 F.2d 798 (2d Cir. 1990) (EEOC acts in a judicial capacity in deciding discrimination claims). Therefore, the affirmance of that determination by the state appellate courts was merely a continuation of that judicial proceeding.

Thus, the question left open and needing resolution is whether a decision by an administrative agency acting in a *legislative* capacity, even if affirmed after traditional state court appellate review, arises from "judicial proceedings of any court" within the meaning of 28 U.S.C. § 1738.

The answer to that question is readily apparent from the discussion of the *Prentis* line of cases, although not squarely addressed in any of them. The Court in *Prentis* held, among other things, that for purposes of the Anti-Injunction Act and res judicata, a legislative proceeding retains that character regardless of whether that proceeding moves from an administrative agency into the courts for judicial review. In *Corboy, supra*, the Court held that the proceedings at issue, although they occurred in court, were not "proceedings in any court" within the meaning of that version of the Anti-Injunction Act.

The Anti-Injunction Act involved in *Prentis* and *Corboy* was enacted in 1793, just three years after the Full Faith and Credit Act, 28 U.S.C. § 1738. Both the Anti-Injunction Act and the Full Faith and Credit Act were based on principles of comity. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (Full Faith and Credit Act); *Public Service Co. of Northern Illinois v. Corboy, supra*, at 161 (Anti-Injunction Act). They use

very similar language in referring to proceedings of state courts. The Full Faith and Credit Act of 1790 requires deference to the "judicial proceedings of any court of [a] State." The Anti-Injunction Act of 1793 prohibited federal courts from issuing an injunction to stay "proceedings in any court of a State." It is reasonable to presume, therefore, that Congress had as its intent the same kind of state court proceedings in these two statutes.

With that presumption, the cases interpreting the Anti-Injunction Act become instructive in interpreting the Full Faith and Credit Act. This Court has held in *Prentis* and *Corboy* that proceedings which are legislative in nature, whether they originally occurred before an administrative body and were subject to judicial review or originally took place before a court, are not "proceedings in any court of a State" within the meaning of the Anti-Injunction Act. In interpreting the current Anti-Injunction Act, 28 U.S.C. § 2283, this Court has held that the phrase "proceedings in a State court" in that statute does not encompass "a state court when it is involved in a non-judicial function." *Roudebush v. Hartke, supra*, at 21.

Based on these prior decisions, it is clear that legislative proceedings, such as those in this case, which continue into the state appellate courts on judicial review are not "judicial proceedings of any court of [a] State," within the meaning of 28 U.S.C. § 1738. With the extensive use in the states of administrative agencies acting at times in a legislative capacity and at other times in a judicial capacity, the issue here presented takes on equally extensive importance. Accordingly, this petition should be granted to clarify that the Full Faith and Credit Act does not require or even allow a federal court to give collateral estoppel effect to state administrative determinations where those agencies are acting in a legislative capacity.

C. This Court Should Insure The Uniform Application Of Seventh Amendment Principles By Preventing The Lower Courts From Allowing States Greater Power To Relegate The Adjudication Of Disputes Involving Only Private Rights To Non-Juries Than This Court Allowed Congress In *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___ , 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

The decision of the Tenth Circuit in this case also conflicts with the decisions of this Court, such as *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___ , 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), defining the limitations imposed by the Seventh Amendment on allowing or recognizing fact-finding by non-juries in disputes involving only private rights. In diversity cases, as in other cases in a federal court, a party's right to a jury trial is protected by the Seventh Amendment, and the parameters of that protection extend to all litigants. *Simler v. Conner*, 372 U.S. 221 (1963); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958).

> Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.

Simler v. Conner, supra, at 222 (a diversity case).

In *Granfinanciera*, this Court addressed the narrow circumstances in which Congress can constitutionally direct to non-Article III courts sitting without a jury the adjudication of certain types of legal claims. This case does not involve either Congress or Article III of the United States Constitution. However, in that case, this Court held that where a cause of action is not a "public right" for Article III purposes,

> then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power." *Crowell v. Benson*, [285 U.S. 22], at 51 [1932].

> And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal.

Id., 109 S.Ct. at 2795.

Beyond peradventure, the Heimanns' claims and the trial court's judgments involve only "private rights." They arise from implied covenants of good faith in the unitization process under the involved mineral leases.

> State-law causes of action for breach of contract or warranty are paradigmatic private rights.

Id. at 2798.

Public rights, on the other hand, must at a minimum be created by statute or arise between "the government and others." *Granfinanciera, supra*, 109 S.Ct. at 2797. *See also, Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, ___ U.S. ___ , 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (Brennan, J., concurring, stating that under *Granfinanciera*, the question of whether a right is a "public right" or a "private right" is a "distinction contingent on the government's role in creating the right." *Id.*, 110 S.Ct. at 1350, n. 3).[4] Here, the Heimanns alleged no violation of state statutory law and have no statutory cause of action. The State, of course, was not a party to this lawsuit.

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[4] The scope of the Seventh Amendment under the public rights doctrine did not arise in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), where this Court held that a court's determination of issues in an equitable suit could collaterally estop relitigation of the same issues in a subsequent legal action without violating a party's Seventh Amendment right to a jury trial. At issue in both the equitable and legal proceedings in *Parklane* were alleged violations of the federal securities statutes, and this Court did not address the question whether those statutes gave rise to public or private rights within the meaning of the public rights doctrine. Therefore, since this case involves only private rights, the issue presented here was not answered in *Parklane*. Moreover, the historic relationship between equitable and legal actions in the context of the Seventh Amendment as discussed in *Parklane* is clearly distinct from the effect on one's right to a jury trial of giving collateral estoppel effect to administrative determinations.

Moreover, the Heimanns' claim for money damages is clearly a legal, not an equitable, one.[5]

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, supra, 110 S.Ct. at 1344-1345, quoting from *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501 (1959).

This Court has consistently recognized that Article III and the Seventh Amendment prevent Congress from delegating to an administrative agency or bankruptcy court a dispute resolution involving *private rights.*

> Our prior cases support administrative fact finding in only those situations involving "public rights," *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases as well are not at all implicated.

Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442, 458 (1977).

> [Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized in *Atlas Roofing,* to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity

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[5] Without question, the Heimanns had a right to a jury trial on the amount and character of damages caused by Amoco's breach of its common law duty of good faith under the three leases. *See, Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963) (per curiam) (recognizing a right to a jury trial in an action for money damages for alleged breaches of implied covenants in a mineral lease).

> all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. 430 U.S. at 457-458. The Constitution nowhere grants Congress such puissant authority.

Granfinanciera, S.A. v. Nordberg, supra, 109 S.Ct. at 2795.

Under this Court's prior decisions, therefore, the Heimanns have a right to a jury trial on their damage claim, and that right is protected by the Seventh Amendment from predetermination by a forum which does not allow the exercise of that right. Moreover, this protection does not depend on whether the non-jury forum was acting in a legislative capacity, as was the OCC in this case, or a judicial capacity, as was the Bankruptcy Court in *Granfinanciera*. In either case, the Seventh Amendment precludes a federal court from giving such fact-finding collateral estoppel effect, since to do so would necessarily deprive federal court litigants of their right to a jury trial on issues involving only private rights. However, depriving a party of his Seventh Amendment rights by giving preclusive effect to *legislative* fact-finding, as here, is even more intolerable since it forecloses any adjudication whatsoever.

In this case, the Tenth Circuit has essentially given the action of a state administrative agency a preclusive effect beyond that which any federal agency could have under this Court's Seventh Amendment and Article III cases. Although Congress *cannot* constitutionally effect the predetermination of a private-rights damage claim by an administrative body where a jury was unavailable, the Tenth Circuit has erroneously held that a state legislature *can* do so and can thereby foreclose a jury trial in federal court without violating a party's Seventh Amendment rights. Its decision is inconsistent with the prior decisions of this Court and sets a dangerous precedent in the context of the powers of the states to foreclose jury trials in federal courts. *Cf., Byrd v. Blue Ridge Rural Electric Cooperative, Inc., supra* (states cannot alter a party's Seventh Amendment rights); *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931) (same).

CONCLUSION

Accordingly, the Heimanns respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

AMOCO PRODUCTION COMPANY, Plaintiff-Counterdefendant-Appellant and Cross-Appellee, -vs- J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; HOWARD W. ROBERTSON; PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE and DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNN HEIMANN, JAY DEE HEIMANN, GENE ALVIN HEIMANN, and RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; and JOHNANN ADEE, in her capacity as Personal Representative of the Estate of Fred P. Heimann, deceased, Defendants-Counterclaimants-Appellees and Cross-Appellants.	FILED United States Court of Appeals-Tenth Circuit May 24, 1990 Robert L. Hoecker Clerk Nos. 88-2070, 88-2072 88-2255, 88-2355

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CV-84-1430)

William F. Carr (Michael B. Campbell & John H. Bemis, with him on the brief), Campbell & Black, Santa Fe, New Mexico, for Plaintiff-Counterdefendant-Appellant and Cross-Appellee.

APPENDIX A

Steven L. Tucker (Jerry Wertheim & Arturo L. Jaramillo, with him on the brief), Jones, Snead, Wertheim, Rodriguez & Wentworth, Santa Fe, New Mexico, for Defendants-Counterclaimants-Appellees and Cross-Appellants.

Charles L. Kaiser and Mary A. Viviano, Davis, Graham & Stubbs, Denver, Colorado, filed an amicus curiae brief for the Rocky Mountain Oil and Gas Association.

Paul A. Cooter, Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, filed an amicus curae brief for the New Mexico Oil and Gas Association.

Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS, District Judge.*

BALDOCK, Circuit Judge.

Amoco Production Company (Amoco) appeals from a $4 million judgment arising out of its unitization of a carbon dioxide field in northeastern New Mexico. Amoco argues, inter alia, that the district court 1) misinstructed the jury on an oil or gas lessee's duty of good faith, and 2) improperly failed to accord collateral estoppel effect to the findings of the New Mexico Oil Conservation Commission (OCC). Our jurisdiction over this diversity case arises under 28 U.S.C. § 1291. We hold that 1) a good faith inquiry into an oil and gas lessee's conduct is unnecessary where the unitization previously was approved by an independent state agency which passes on the fairness of the participation formula, such as the OCC, and 2) the OCC's approval of the unitization plan in this case has collateral estoppel effect upon the appellees' challenge to the unit's allocation formula. Accordingly, we reverse.

I.

Defendants-Counterclaimants-Appellees (the Heimanns) are a family of ranchers who have lived in northeastern New Mexico

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*The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

since the early part of this century. The Heimanns own 48,120 acres of ranch land in Union, Quay and Harding Counties, New Mexico. Between 1971 and 1974, the Heimanns executed three carbon dioxide (CO_2) and mineral leases with Amoco. Each of these three leases contained a unitization clause which granted Amoco the right to unitize the Heimanns' mineral interests with other lands in the area, subject to approval "by any governmental authority." The leases granted the Heimanns a one-eighth royalty of the net proceeds received from all oil, gas or CO_2 produced on their lands.

In the late 1970's, Amoco embarked upon a plan to pipe CO_2 from northern New Mexico to its west Texas oil fields in order to enhance recovery there. Amoco therefore sought to unitize the mineral rights to approximately 1,174,225 acres of land in Harding, Union and Quay counties, including the Heimanns' land.[1] The proposed agreement for the "Bravo Dome" unit allocated royalties on the basis of "surface acreage;" production was allocated according to the total surface areas contained in each tract. Amoco sought approval of the Bravo Dome unit from the OCC.[2] The Commission found that "approval of the proposed unit agreement should promote the preventions of waste and the protection of correlative rights within the unit area" and consequently approved the unit agreement. Amoco Prod. Co., No. R-6446, unpub. order at 1 (N.M. Oil. Conservation Comm'n Aug. 14 1980).

Together with other opponents of the Bravo Dome unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns and other opponents of the unit appeared before the OCC and presented evidence that the per-acre participation formula did not protect their correlative rights. The OCC found in pertinent part:

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[1] Amoco held a 74% working interest in the unitized lands.

[2] Although its name might suggest otherwise, the New Mexico Oil Conservation Commission and its parent, the Oil Conservation Division, maintain jurisdiction over carbon dioxide resources as well as hydrocarbons. N.M. Stat. Ann. §70-2-34. Under New Mexico law, the same provisions which relate to natural gas apply to CO_2, insofar as they are applicable. Id.

(14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

(a) a formula which provides that each owner in the unit shall share in the production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geological and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

* * *

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

Amoco Prod. Co., No. R-6446-B, unpub. order at 3-4 (N.M. Oil. Conservation Comm'n Jan. 23, 1981).

The Heimanns appealed the OCC's order on rehearing to the New Mexico state district court for Taos County. They argued that there was not substantial evidence supporting the OCC's determination that the proposed unitization would protect their correlative rights. The district court, however, affirmed the Commission. Casados v. Oil Conservation Comm'n, No. 81-176, unpub. order at 4 (N.M. 8th Dist. Apr. 5. 1982). The Heimanns appealed the district court's order to the New Mexico Supreme Court which affirmed. Casados v. Oil Conservation Comm'n, No. 14,359, unpub. order at 8 (N.M. Nov. 10, 1983). The Supreme Court held that the record contained "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected." Id.

In 1984, Amoco filed suit against the Heimanns in federal district court seeking a declaratory judgment under 28 U.S.C. § 2201(a) that Amoco had properly unitized the interests covered under the leases. The Heimanns counterclaimed alleging three theories of recovery: 1) unfair allocation of royalties under the unitization agreement; 2) undervaluation of the extracted CO_2; and 3) surface damage. At the conclusion of the trial, the court instructed the jury on the components of Amoco's good faith duty which was obliged to follow in exercising its power under the unitization clause:

> INSTRUCTION NO. 18
>
> Amoco's duty of good faith is not fulfilled merely by refraining from dishonest conduct. Rather, Amoco has certain affirmative duties which it must fulfill as a prerequisite to a finding of good faith. These are:
>
> (a) Disclosure to the Heimanns of the material facts affecting their interest in the proposed unitization, including the geological and geophysical characteristics of their lands compared with that of other lands within the proposed unit area,

and the signficance of that data as it affects the Heimanns' interest;

(b) Cooperation with the Heimanns in planning the unitization program. Such cooperation may consist of communicating to the extent possible with the Heimanns in an effort to impart pertinent knowledge to the Heimanns; and

(c) Disclosure to the Heimanns of any interests of Amoco in unitization which were adverse to the interest of the Heimanns.

The jury returned a special verdict in favor of Amoco on the fair market value and surface damage claims, but found for the Heimanns on the royalty allocation charge. The jury awarded the Heimanns damages in the amount of $3,500,000 compensatory damages and $500,000 punitive damages. The district court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns lands void.

II.

Unitization refers to the consolidation of mineral or leasehold interests in oil or gas covering a common source of supply.[3] 1 B. Kramer & P. Martin, The Law of Pooling and Unitization § 1.02 at 1-3 (3d ed. 1989); see Parkin v. Corporation Comm'n of Kansas, 677 P.2d 991, 1002 (Kan. 1984). Unitization resulted from state legislatures' efforts to modify the rule of capture which had previously been applied to oil and gas law. See Clark Oil Prod. Co. v. Hodel, 667 F. Supp. 281, 290 (D.N.D. 1982); Kramer & Martin, supra p. 7, § 3.02. The goals of unitization are conserving resources by preventing waste and protecting landowners' correla-

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[3] While frequently used interchangeably, the terms "pooling" and "unitization" refer to separate procedures. Pooling involves the combination of several small tracts of land to meet the spacing requirements for a single well. Unitization refers to field-wide or partial field-wide operation of a producing reservoir involving multiple adjoining land tracts. 6 H. Williams & C. Meyers, Oil and Gas Law § 901 at 2 (1989); R. Hemingway, Law of Oil and Gas § 7.13 (1983).

tive rights.[4] See e.g. N.M. Stat. Ann. § 70-2-11 (1987 Rep. Pamp.). Following unitization of an oil field, the royalty clause of a oil and gas lease generally is modified and the lessor becomes entitled to a royalty based on a pro rata share of the production attributable to its land, regardless of whether production is from that land or another tract included within the unit. Williams & Meyers, supra n. 2, § 951 at 694.12. The working interest owners' share is based on a participation formula calculated from geological, physical and economic data. Kramer & Martin, supra p. 7, § 17.02[5]. No single method of calculating the participation formula is appropriate for all situations, Williams & Meyers, supra n. 2, § 970 at 816.5, and although the most frequently employed basis for allocating unitization production is surface acreage, id. § 970.1 at 816.6, arriving at a perfect participation agreement is impossible. Kramer & Martin, supra p. 7, § 17.02[5][a] at 17-16. As this court has explained:

> The percentage of an estimated pool recovery under a unitized operation assigned to a particular lease represents at best only an estimated contribution from that tract under a single unitization operation. Without more, it cannot be taken as evidence of the estimated recovery therefrom under an independent, individual operation of the lease.

Stanolind Oil & Gas Co. v. Sellers, 174 F.2d 948, 956 (10th Cir.), cert. denied, 338 U.S. 867 (1949).

Two methods exist whereby separately-owned tracts can be combined in a single unit: voluntary unitization by contract or forced unitization by regulatory authority. See Douglass, Powers and Problems of Lessee Pooling, 34 Sw. Legal Fed'n Oil & Gas Inst. 231 (1983). Because the Bravo Dome unit resulted from Amoco's voluntary petition to the OCC, we concern ourselves here with voluntary unitization.

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[4] "Correlative rights" are "rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply." United Petroleum Exploration v. Premier Resources, 511 F. Supp. 127, 129 (W.D. Okla. 1980).

The unitization clause of an oil and gas lease grants the lessee the power to unitize the lessors interest without further consent by the lessor.[5] Kramer & Martin, supra p. 7, § 8.01 at 8-1; Hemingway, supra n. 2, § 7.13. Without such a clause, the lessee has no authority to pool or unitize the interests of the lessor. Kramer & Martin, supra p. 7, § 8.01 at 8-2. See also Celsius Energy Co. v. Mid Am. Petroleum, 894 F. 2d 1238, 1240 (10th Cir. 1990) (language of lease determines extent of lessee's pooling authority). Because neither the lessor nor the lessee usually knows the relevant facts concerning the need for unitization at the time the lease is signed, unitization clauses must be framed in general terms. Phillips Petroleum Co. v. Peterson, 218 F.2d 926, 933 (10th Cir. 1954), cert. denied, 349 U.S. 947 (1955); Kramer & Martin, supra p. 7, § 8.01 at 8-2; Hemingway, supra n. 2, § 7.13 (unitization clauses in oil and gas leases are to be interpreted liberally). But see Leonard v. Barnes, 404 P. 2d 292, 301 (N.M. 1965) (where an oil and gas lease contains no express provision to unitize, courts will not strain to interpret contract to provide for unitization or pooling).

In addition to contractual limitations on the exercise of the lessee's unitization power, an oil and gas lessee owes the lessor the additional duty of fair dealing, often stated in terms of good faith. Kramer & Martin, supra p. 7, § 8.06 at 8-32; Hemingway, supra n. 2, § 7.13. In Boone v. Kerr-McGee Oil Indus., 217 F.2d 63 (10th Cir. 1954), this court explained that the good faith duty is necessary because of the unilateral power vested in the lessee by a unitization clause:

> Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for the exercise of such power. All the authorities are to this effect.

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[5] Such clauses can be said to effectuate voluntary pooling or unitization in that the pooling or unitization is not compelled by state authority. On the other hand, because such clauses inevitably vest the lessee with the unilateral power to pool or unitize, the pooling or unitization implemented under such clauses is not voluntary for the lessor. See Kramer & Martin, supra p. 7, § 8.02 at 8-2.

> In approaching a consideration of this question, we keep in mind a further principle and that is that the law presumes that men will act honestly and fairly in dealing with each other. In other words, the law presumes honest and fair dealing, and bad faith or fraud is never presumed and must be established affirmatively.

Id. at 65 (footnote omitted). In Peterson, we further explained the good faith duty of oil and gas lessees in effectuating voluntary unitization agreements:

> A lessee is bound by implied covenants in the lease to diligently explore and develop the lease and to do so under a fair unitization plan, if unitization is effected; to market the production if the oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for the interests of both the lessor and the lessee, would do; and, in case of unitization to act fairly and in good faith, with due regard for the lessors' interests, and to provide for a fair apportionment of the oil produced.

218 F.2d at 934 (footnote omitted). Because the unitization plan at issue in Peterson increased efficiency of oil production, we held the lessee's unitization to be in good faith. Id.

A lessee's good faith is often called into question when the pooling or unitization power is exercised close to the end of the primary term, Kramer & Martin, supra p. 7, § 8.06[2]; see, e.g., Amoco Prod. Co. v. Underwood, 558 S.W. 2d 509, 512-13 (Tex. Civ. App. 1977) (where unit established solely to retain leases that would otherwise expire, lessee acted in bad faith); but see Boone, 217 F.2d at 65-66 (mere fact that only a few months remained in lease at time of unitization did not constitute bad faith), when the lessee includes nonproductive land in the unit, Kramer & Martin, supra p. 7, § 8.06[2]; see e.g., Southwest Gas Prod. Co. v. Seale, 191 So.2d 115, 121 (Miss. 1966), or when the lessee's economic interests are antagonistic to those of the lessor, Kramer & Martin, supra p. 7, § 8.06[2]. However, when and how to drill usually remains the prerogative of the driller; a mere exercise of that

power contrary to the desires of the lessors or the weight of geological opinion does not, in itself, show a lack of good faith. Diggs v. Cities Serv. Oil Co., 241 F. 2d 425, 427 & n.2 (10th Cir. 1957). Moreover, although the lessee's duty of good faith requires that it take the lessor's interest into account in exercising its powers under the unitization clause, the lessee need not subordinate its interest entirely to those of the lessor. See Elliott v. Davis, 553 S.W. 2d 223, 226-27 (Tex. Civ. App. 1977). Thus, although the lessee's good faith duty has at times been referred to as fiduciary, such standard is altogether too strict. See Amoco Prod. Co. v. Jacobs, 746 F.2d 1394, 1398-99 (10th Cir. 1984); Vela v. Pennzoil Producing Co., 723 S.W.2d 199, 206 (Tex. App. 1986).

A.

The district court understandably relied upon this court's opinion in Jacobs for the proposition that, in order to satisfy the duty of good faith, a lessee must: 1) disclose geological facts affecting the lessor's interest in the unitization; 2) cooperate with the lessor in planning the unitization; and 3) disclose any interest in the unitization adverse to the lessor. While Jacobs contains language that can be read to support this view, 746 F.2d at 1401, we cannot determine from the text of the opinion whether the court actually intended to create such an expansive definition of good faith.[6] After consulting Boone, Peterson and other cases and authorities on unitization, however, we conclude for the reasons stated below that Jacobs did not intend to create such an unprecedented rule of good faith.

Although inclusion of geologically inferior land in the Bravo Dome unit by lessee Amoco could violate its duty of good faith,

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[6] We are not alone in our inability to decipher Jacobs's holding; several scholarly works have expressed similar difficulty. See e.g., Kramer & Martin, supra p. 7, § 17.01 at 17-3 n.4 (criticizing Jacobs); E. Kuntz, J. Lowe, O. Anderson & E. Smith, Cases and Materials on Oil and Gas Law, 744 (1986) (suggesting students read Jacobs "[for] a case illustrating the difficulty courts have in dealing with this question [of good faith]"). Moreover, it is apparent that the district court shared our confusion over Jacobs when it informed counsel: "[B]eing very frank with you, both you gentlemen on both sides are apparently. . .as confused on what [Jacobs] said as I am." Rec. vol. IV at 350.

no authority imposes a duty upon lessees to produce and disclose geological facts to a lessor comparing the lessor's mineral interests to those in the rest of the unit. Under New Mexico law, an oil or gas lease must be given the legal affect resulting from the language within the four corners of the instrument, absent ambiguity. See Owens v. Superior Oil Co., 730 P.2d 458, 459 (N.M. 1986). Because the Heimanns assented to a lease which unequivocally granted Amoco the power to unitize, subject to approval by governmental authority, we decline to stray beyond the four corners of the lease to impose upon Amoco a duty to cooperate with the lessor in planning its unitization. If Amoco operated the Bravo Dome unit in a manner adverse to the Heimanns' interest, such conduct might constitute bad faith. However, no authority imposes an affirmative duty upon a lessee to disclose every interest in a unitization adverse to the lessor and we decline to create one here.

While we understand how the district court, relying upon the equivocal language in Jacobs, reasonably could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, we conclude that the court's instruction was too broad. Because we hold that the OCC's approval of the Bravo Dome unit renders the good faith inquiry unnecessary in this case, we do not address whether the erroneous instruction prejudiced Amoco.

B.

A good faith duty is imposed where unbridled discretion is vested in an oil or gas lessee by a unitization clause. See Boone, 217 F.2d at 65. If a lessee had completed discretion in unitizing an oil or gas field, the lessee might, in bad faith, combine lessor's land with less productive land, calculate a production formula which underrepresents the lessor's mineral interest, or unitize solely to avoid the termination of a lease. But where a neutral and detached agency approves a proposed unitization after undertaking an extensive and independent study of geological, physical and economic data, the agency normally will constrain such abuses by a lessee. See Celsius Energy, 894 F. 2d at 1240 (good faith requirement imposed to limit lessee's broad authority under pooling clauses.).

A good faith duty also may serve to assure the fair allocation of oil and gas produced by the unit. See Phillips, 218 F.2d at 934.

Where the lessee maintains complete discretion in formulating a unitization plan, the lessee might abuse that discretion and select a participation formula which underrepresents the contribution to the unit from the lessor's land. However, where an agency such as the OCC passes upon the fairness of a proposed participation formula, concerns of lessee unfairness are ameliorated. For unless a proposed unitization plan provides for a fair participation formula, it will not win OCC approval. See N.M. Stat. Ann. §§ 70-2-11, 70-2-33(H); see also N.M. Stat. Ann. § 70-7-6(B) (approval criteria under Statutory Unitization Act).

Evaluating the statutory framework behind the OCC, we are convinced that it ameliorates the danger of lessee unfairness which gave rise to the good faith duty. Where approval of a unitization plan is finally determined by the OCC, the dangers resulting from the lessee's complete discretion which concerned this court in Boone, are absent. See also Celsius Energy, slip op. at 6. And where the OCC approves the participation formula after a careful and independent inquiry into the relevant geophysical and economic criteria, a fair allocation of proceeds is determined without resort to the lessee's good faith duty. Therefore, because the components of a lessee's good faith duty are necessarity encompassed within the OCC's approval criteria, it is a waste of judicial resources to conduct a second good faith inquiry here.[7]

We recognize that our analysis may conflict with language in Jacobs suggesting that the OCC cannot, by its "blessing" of a unitization plan, rule on the question of good faith. 746 F.2d at 1403-04. However, with all due respect, we believe the Court in Jacobs overlooked explicit statutory language empowering the OCC to rule on the fairness of a proposed unitization plan, see N.M. Stat. Ann. §§ 70-2-33(H); cf. N.M. Stat. Ann. § 70-7-6 (B), and ignored the proper deference owed by federal courts to the

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[7] We note that the Amoco-Heimann lease did not require approval by the New Mexico Oil Conservaton Commission, but rather, "by any governmental authority." In holding that the OCC's approval of the Bravo Dome unit is conclusive on the issue of good faith, we therefore limit our holding to the OCC and recognize that a different result may prevail under a different statutory scheme. See, e.g., Samson Resources Co. v. Corporation Comm'n, 702 P.2d 19, 23 (Okla. 1985) (private action alleging good faith violation by unit operator was not precluded by Oklahoma Corporation Commission's previous approval of unit because action did not implicate correlative rights, as defined under Oklahoma law).

findings of state administrative agencies, see discussion infra at 17-20. Given the elaborate procedures required for obtaining OCC approval of a proposed unitization, as well as the technical expertise possessed by its members, it is inaccurate to describe the Commission's approval process as a mere "blessing." See N.M. Stat. Ann. §§ 70-2-4 through 70-2-10. Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. To the extent that Jacobs holds to the contrary, it is overruled.[8]

III

Having concluded that a good faith inquiry is unnecessary where the fairness of a unitization plan already has been adjudged by a regulatory agency entitled to full faith and credit by a federal court, we must determine whether the OCC is entitled to such credit.

A.

Where a state agency acts in a judicial capacity, resolves facts properly before it and the parties have had an adequate opportunity to litigate, we accord the agency's decision the same preclusive effect to which it would be entitled in the state's courts. University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986). New Mexico has granted preclusive effect to the findings of administrative agencies acting within their proper capacity. See State v. Rio Rancho Estates, Inc., 624 P.2d 502, 504 N.M. (1981); Property Tax Dept. v. Molycorp, Inc., 555 P.2d 903,905 (N.M. 1976); City of Socorro v. Cook, 173 P. 682, 684-85 (N.M. 1918). However, New Mexico courts have never considered the preclusive effect of an OCC decision. Applying the standard enunciated by the New Mexico courts, we therefore consult general principles of preclusion to

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[8] Because this panel opinion overrules Tenth Circuit precedent, it has been circulated among all active judges of this court. All judges agree with the panel's holding that, because Amoco's good faith was necessarily encompassed with the OCC's consideration of the Bravo Dome unit, the Commission's approval of said unitization is conclusive on the question of Amoco's good faith.

anticipate the effect of the OCC approval of the Bravo Dome unit.

When an agency's function resembles that of a trial court, the agency adjudication is entitled to preclusive effect. 4 K. Davis, Administrative Law Treatise § 21:3 at 51-52 (1983). Conversely, where the agency's action is merely ministerial, res judicata and collateral estoppel do not attach. Id. In determining whether the administrative agency was "acting in a judicial capacity," Elliott, 478 U.S. at 799, no single model of procedural fairness is dictated by the due process clause, Kremer v. Chemical Constr. Co., 456 U.S. 461, 483 (1981). Rather, we must look to our prior cases as well as the Restatement (Second) Judgments § 83[9] to determine whether the OCC acts in a judicial capacity when it approves a proposed unitization plan.

In Long v. Laramie County Community College Dist., 840 F.2d 743 (10th Cir.), cert. denied, 109 S. Ct. 73 (1988), we held that a state college grievance committee's finding that an employee had been harassed sexually was preclusive in a subsequent action brought under 42 U.S.C. §§ 1983, 1985. Because most of the par-

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[9] The Restatement provides in pertinent part:

§ 83. Adjudicative Determination by Administrative Tribunal.

* * *

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication. . . .

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specific parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

* * * *

Restatement (Second) Judgments § 83 at 266-67 (1982). Although this section specifically refers to "res judicata," or claim preclusion, it also applies to collateral estoppel, issue preclusion. Id. comment b at 270-71.

ties before the grievance committee had been represented by counsel, witnesses were cross-examined, documentary evidence was introduced in accordance with Wyoming APA and the committee rendered findings and recommendations which were reviewed by College's Board of Trustees, we concluded that the commission was acting in a judicial capacity under Elliott.[10] Id. at 751. In Katter v. Arkansas La. Gas, 765 F. 2d 730 (8th Cir. 1985), the Eighth Circuit similarly held that an integration order by the Arkansas Oil and Gas Commission was entitled to full faith and credit in a subsequent action brought in federal court:

> Clearly the Arkansas legislature intended an adjudicatory, in rem order [by the Oil and Gas Commission] which, when final, would have all the force and effect of a court judgment; and in fact, required and provided for all the things necessary to give it that effect. (citation omitted). In general, then, such an order would fix the parties' rights and duties as fully and finally as a court judgment—albeit here a default judgment—and would be entitled to the same full faith and credit and preclusive effect.

Id. at 734.

B.

The New Mexico Oil Conservation Commission consists of three persons: a designee of the Commissioner of Public Lands, a designee of the Secretary of Energy, Minerals and Natural Resources and the Director of the Oil Conservation Division. N.M. Stat. Ann. § 70-2-4. The two designated members must be "persons who have expertise in the regulation of petroleum production by virtue of education or training," id., while the third member must either be a registered petroleum engineer or else,

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[10] Both Elliott and Long considered whether state administrative fact findings are preclusive in a federal cause of action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico courts. See Braselton v. Clearfield State Bank, 606 F. 2d 285, 287 & n. 1 (10th Cir. 1979). We therefore rely upon Elliott and Long only for general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

by virtue of education and experience, have experience in petroleum engineering. N.M. Stat. Ann. §70-2-5(B). The OCC has authority to subpoena witnesses, compel testimony and require production of books, papers and records relative to matters within the commission's jurisdiction. N.M. Stat. Ann. § 70-2-8. OCC members may administer oaths to any witness in any proceeding; a person who testifies falsely under oath before the commission is guilty of perjury. N.M. Stat. Ann. § 70-2-10 Hearings of the OCC are held in public, N.M. Oil Conservation Div. R. 1201 (1989), after providing interested parties with notice, N.M. Oil Conservation Div. R. 1204-07, and may be initiated upon the motion of any operator, producer or person having a pertinent property interest. N.M. Oil Conservation Div. R. 1203. All pleadings before the OCC must be mailed to adverse parties, N.M. Oil Conservation Div. R. 1208, and all testimony delivered before the Commission must be formally recorded, N.M. Oil Conservation Div. R. 1210. Any person testifying under subpoena or in support of or in opposition to a motion before the Commission must do so under oath. Id. The OCC's procedural rules further provide:

> Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by doing so, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

N.M. Oil Conservation Div. R. 1212. In reaching a decision, the OCC must make written findings of fact that have sufficient support in the record. Fasken v. Oil Conservation Comm'n, 532 P. 2d 588, 590 (N.M. 1975). Any party adversely affected by an order of the Commission may petition for rehearing, N.M. Stat. Ann. § 70-2-25(A); any party dissatisfied with the disposition of the rehearing may appeal to the state district court, N.M. Stat. Ann. § 70-2-25(B), where the OCC's unitization decision is reviewed for substantial evidence, Viking Petroleum v. Oil Conservation

Comm'n, 672 P.2d 280, 282 (N.M. 1983). Although New Mexico courts will accord "[s]pecial weight. . .to the experience, technical competence and specialized knowledge of the Commission[,]" id., the OCC's finding must be based on ultimate facts involving "foundationary matters," and "basic conclusions of fact [.]" Continental Oil v. Oil Conservation Comm'n, 373 P. 2d 809, 814-15 (N.M. 1962).[11]

Applying Long and the criteria enunciated in Restatement (Second) Judgments § 83, we are satisfied that the OCC's approval process is entitled to preclusive effect. As parties interested in the OCC's proceedings, the Heimanns received notice of the proposed adjudication, see id. § 83(2)(a), and, at least during the rehearing, were represented by counsel, see Long, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimann's enjoyed the opportunity to cross-examine Amoco's witnesses and present evidence and legal argument of their own. See id; Restatement (Second) Judgments § 83(2)(b). The OCC's order approving the Bravo Dome unit formulated the issues of law and fact in terms of their specific application to the Heimanns correlative rights, see id. § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, see id. § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo Dome unit; its decision is therefore entitled to preclusive effect. See City of Socorro, 173 P. at 684-85.

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[11] Continental Oil contains language which, when viewed in isolation, suggests that the OCC is not acting in a judicial capacity for preclusion purposes when it approves a proposed unitization plan. 373 P. 2d at 818. However, closer analysis of the holding belies such an interpretation. Continental Oil held: 1) that the OCC is statutorily required to engage in administrative factfinding on the question of waste and correlative rights; 2) that OCC decisions must be based on those "foundational" matters; and, 3) that separation of powers precludes courts from intruding upon the OCC's factfinding prerogatives. Whether the procedures followed by the OCC afford a sufficient degree of due process to be accorded preclusive effect in subsequent proceedings was a question that Continental Oil did not address. Accordingly, notwithstanding the semantic affinity of Continental Oil to the instant inquiry, the Heimanns' reliance of Continental Oil for the proposition that OCC determinations are not entitled to preclusive effect is misplaced. Cf. Rio Rancho Estates, 624 P.2d at 504 (findings of New Mexico State Engineer have preclusive effect in subsequent proceedings).

IV.

Having concluded that the OCC's approval of the Bravo Dome unit is entitled to full faith and credit, we must now determine whether the Heimanns are collaterally estopped from challenging the fairness of the participation formula adopted as part of the unitization plan. Federal courts must apply the law of the state rendering the judgment to determine its collateral estoppel effect; we may not accord greater preclusive effect to a state court judgment than would the state in which the judgment is rendered. Federal Ins. Co. v. Gates Learjet Corp., 823 F. 2d 383, 385 (10th Cir. 1987); see C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction § 4472 (1981).

A.

This court previously has recognized that decisions by state oil conservation agencies may be entitled to collateral estoppel effect. In Chenoweth v. Pan Am. Petroleum, 314 F. 2d 63, 65 (10th Cir. 1963), a lessor of unitized mineral interests sought cancellation of an oil and gas lease. Because the participation formula had been decided upon previously by the Oklahoma Corporation Commission, we concluded that the lessor's actions constituted an improper collateral attack upon the Commission's authority.

> The Oklahoma Corporation Commission has unitized the Oil Creek in this area and [plaintiffs] participate in this production under the established formula. Appellant . . . objects to this unitization order and has an appeal pending on this matter in the Supreme Court of Oklahoma. He attempts to litigate the validity of this order on this appeal, but this cannot be done under these circumstances. To do so would clearly be a collateral attack on the order of the Commission.

Id. Other circuits have also recognized that unitization orders by state oil conservation agencies must remain inviolate to collateral attack. See e.g., Katter, 765 F. 2d at 734 (Arkansas law); Trahan v. Superior Oil, 700 F. 2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); Mize v. Exxon, 640 F. 2d 637, 640 (5th Cir. 1981) (Alabama law). But where a subsequent action does not directly

or indirectly challenge a previous order by a state oil conservation commission, collateral estoppel and res judicata do not attach. See e.g., Greyhound Leasing & Financial Corp. v. Joiner City Unit, 444 F. 2d 439, 445 (10th Cir. 1971) (lessor's action against unit operator for damages caused by secondary recovery methods did not constitute collateral attack to any order of the Oklahoma Corporation Commission); Richardson v. Phillips Petroleum, 791 F. 2d 641, 646 (8th Cir. 1986) (because denial of money damages was not necessarily encompassed in Arkansas Oil and Gas Commission's denial of injunctive relief halting secondary recovery operations, Commission's decision did not bar subsequent action for money damages).

B.

New Mexico traditionally requires four elements for the invocation of collateral estoppel: 1) the parties are the same or are privies of the original parties; 2) the cause of action is different; 3) the issue of fact was actually litigated; and 4) the issue was necessarily determined. International Paper Co. v Farrar, 700 P.2d 642, 644-45 (N.M. 1985). We address these criteria in turn.

Same Parties: The Heimanns were included among the designated parties who sought and obtained rehearing of the OCC's approval of the Bravo Dome unit. They also were among the persons seeking reversal of the OCC's order in the state district court and the New Mexico Supreme Court.

Different Cause of Action: The administrative proceedings before the OCC and judicial proceedings before the New Mexico courts concerning the approval of the Bravo Dome unit constituted a separate and distinct cause of action from the present action in federal court alleging bad faith on behalf of Amoco.

Issue Actually Litigated: New Mexico employs two criteria for determining whether a proposed unitization may be approved by the OCC: 1) prevention of waste and, 2) protection of correlative rights. N.M. Stat. Ann. § 70-2-11, New Mexico defines correlative rights as follows:

> "correlative rights" means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a pool

> to produce without waste his just and equitable share of the oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and, for such purposes, to use his just and equitable share of the reservoir energy.

N.M. Stat. Ann. § 70-2-33(H) (emphasis supplied). Taking the plain meaning of the relevant statute, inherent among the OCC's criteria for approving a unitization plan is the fairness of the participation formula. See id.; accord N.M. Stat. Ann. § 70-7-6 (B). In this case, the Heimanns argue that the per-acre allocation of the CO_2 revenues under the participation agreement did not fairly represent the quantity of recoverable CO_2 under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such rights, we must conclude that the fairness of the Bravo Dome unit participation plan was "actually litigated" before the OCC. See Chenoweth, 314 F. 2d at 65; Katter, 765 F. 2d at 734.

Issue Necessarily Determined: Although New Mexico accords preclusive effect to the adjudications of administrative agencies in subsequent judicial proceedings, in order to have such effect, the administrative finding must have addressed questions which were essential to the agency's decision. See Rio Rancho Estates, 624 P.2d at 504. As stated above, in order to approve a unitization plan, the OCC must find that the participation formula protects the correlative rights of all pertinent parties. See N.M. Stat. Ann. § 70-2-11. And in order to determine that the Bravo Dome unitization protected the Heimanns' correlative rights, it was essential that the

OCC rule upon the fairness of the unit's participation formula.[12]

"[C]ollateral estoppel not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." Allen v. McCurry, 449 U.S. 90, 95-96 (1980). Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review, undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns' correlative rights would be accorded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

The district court shall vacate the judgment in favor of the Heimanns and enter judgment in favor of Amoco consistent with this opinion.[13]

REVERSED AND REMANDED.

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[12] The Heimanns cite this court's recent opinion of Leck v. Continental Oil Co., 892 F.2d 68 (10th Cir. 1989), for the proposition that collateral estoppel should not attach to the findings of the OCC. In Leck, we certified to the Oklahoma Supreme Court several questions concerning the jurisdiction of the Oklahoma Corporation Commission vis a vis the state courts. Id. at 68. Applying Oklahoma law, the Supreme Court held that the district court, not the Corporation Commission, had jurisdiction over a lessor's claim against the unit operator for a breach of contract and violation of the operator's fiduciary duty to protect lessor's correlative rights. Leck v. Continental Oil Co., ___ P.2d ___ , No. 72,054, slip op. at 8, 10 (Okla. Nov. 28, 1989). The Oklahoma court limited its holding to the jurisdictional question and explicitly declined to address the res judicata or collateral estoppel effect of the prior adjudication before the Commission. Id. at 8. Accordingly, to the extent that the Heimanns rely upon Leck to argue that collateral estoppel should not attach to the findings of the OCC, their reliance is misplaced.

[13] Because we reverse the judgment of the district court, we need not consider the additional issues raised by Amoco on appeal or address the Heimanns' cross-appeal.

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

CASE NO. 6967
Order No. R-6446

APPLICATION OF AMOCO PRODUCTION COMPANY FOR APPROVAL OF THE BRAVO DOME CARBON DIOXIDE GAS UNIT AGREEMENT, UNION, HARDING, AND QUAY COUNTIES, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on July 21, 1980, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 14th day of August, 1980, the Commission, a quorum being present, having considered the testimony, the record, and the exhibits, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof with respect to prevention of waste and protection of correlative rights.

(2) That the applicant, Amoco Production Company, seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement covering 1,174,225.43 acres, more or less, of State, Federal and Fee lands described in Exhibit A attached hereto and incorporated herein by reference.

(3) That all plans of development and operation and all expansions or contractions of the unit area should be submitted to the Director of the Oil Conservation Division, hereinafter referred to as the Division, for approval.

(4) That approval of the proposed unit agreement should promote the prevention of waste and the protection of correlative rights within the unit area.

IT IS THEREFORE ORDERED:

(1) That the Bravo Dome Carbon Dioxide Gas Unit Agreement is hereby approved.

(2) That the plan contained in said unit agreement for the development and operation of the unit area is hereby approved in principle as a proper conservation measure; provided, however, that notwithstanding any of the provisions contained in said unit agreement, this approval shall not be considered as waiving or relinquishing, in any manner, any right, duty, or obligation which is now, or may hereafter be, vested in the Division to supervise and control operations for the exploration and development of any lands committed to the unit and production of carbon dioxide gas therefrom.

(3) That the unit operator shall file with the Division an executed original or executed counterpart of the unit agreement within 30 days after the effective date thereof; that in the event of subsequent joinder by any party or expansion or contraction of the unit area, the unit operator shall file with the Division within 30 days thereafter counterparts of the unit agreement reflecting the subscription of those interests having joined or ratified.

(4) That all plans of development and operation and all expansions or contractions of the unit area shall be submitted to the Director of the Oil Conservation Division for approval.

(5) That this order shall become effective 60 days after the approval of said unit agreement by the Commissioner of Public Lands for the State of New Mexico and the Director of the United States Geological Survey; that this order shall terminate ipso facto upon the termination of said unit agreement; and that the last unit operator shall notify the Division immediately in writing of such termination.

(6) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ALEX J. ARMIJO, Member

s/Emery C. Arnold
EMERY C. ARNOLD, Member

s/Joe D. Ramey
JOE D. RAMEY, Member & Secretary

SEAL

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

CASE NO. 6967
Order No. R-6446

APPLICATION OF AMOCO PRODUCTION COMPANY FOR APPROVAL OF THE BRAVO DOME CARBON DIOXIDE GAS UNIT AGREEMENT, UNION, HARDING, AND QUAY COUNTIES, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for rehearing at 9:00 a.m. on October 9, 1980 at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 23rd day of January, 1981, the Commission, a quorum being present, having considered the testimony, the record, and the exhibits, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof with respect to prevention of waste and protection of correlative rights.

(2) That the applicant, Amoco Production Company, seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement (Unit) covering 1,174,225.43 acres, more or less, of State, Federal and Fee lands described in Exhibit A attached hereto and incorporated herein by reference.

(3) That this matter originally came on for hearing before the Commission on July 21, 1980.

(4) That on August 14, 1980, the Commission entered its Order No. R-6446 approving said Bravo Dome Carbon Dioxide Unit Agreement.

(5) That the Commission received a timely application for rehearing of Case No. 6967 from Abe Casados, et al (petitioners).

(6) That petitioners alleged, among other things, that the application was premature, that the Commission's findings and conclusions were based on insufficient evidence, and that additional findings concerning prevention of waste and protection of correlative rights should be made by the Commission.

(7) That on October 9, 1980, a rehearing was held in Case No. 6967 for the purpose of permitting all interested parties to appear and present evidence relating to this matter, including the following particulars:

(a) prevention of waste within the unit area,

(b) protection of correlative rights within the unit area as afforded by the unit agreement, its plan and participation formula, and

(c) whether the unit agreement and its plan are premature.

(8) That the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease by lease basis:

(a) more efficient, orderly and economic exploration of the unit area; and

(b) more economical production, field gathering, and treatment of carbon dioxide gas within the unit area

(9) That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

(10) That the unit area is a large area with carbon dioxide gas potential.

(11) That at the time of the hearing and the rehearing some areas

within the unit boundary had experienced a long history of production.

(12) That at the time of the hearing and the rehearing a number of exploratory wells had been completed in scattered parts of the unit.

(13) That the developed acreage within the proposed unit is very small when compared to the total unit area and when viewed as a whole, the unit must be considered to be an exploratory unit.

(14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

(a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing and income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

(18) That the evidence presented at the rehearing demonstrated a clear need for the carbon dioxide gas projected to be available from the unit for purposes of injection for the enhanced recovery of crude oil from depleted reservoirs.

(19) That approval of the unit and development of the unit area at this time will not result in the premature availability or excess capacity of carbon dioxide gas for injection for enhanced recovery purposes.

(20) That the Commissioner of Public Lands and the United States Geological Survey have approved the proposed unit with respect to state and federal lands committed to the unit.

(21) That the application is not premature.

(22) That this is the largest unit ever proposed in the State of New Mexico, and perhaps the United States.

(23) That there is no other carbon dioxide gas unit in the State.

(24) That the Commission has no experience with the long term operation of either a unit of this size or of a unit for the development and production of carbon dioxide gas.

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

(26) That the current availability of reservoir data in this large exploratory unit does not now permit the presentation of evidence or the finding that the unit agreement provides for the long term development of the unit area in a method which will prevent waste and which is fair to the owners of interests therein.

(27) That further development within the unit area should provide the data upon which such determinations could, from time to time, be made.

(28) That the Commission is empowered and has the duty with respect to unit agreements to do whatever may be reasonably necessary to prevent waste and protect correlative rights.

(29) That the Commission may and should exercise continuing jurisdiction over the unit relative to all matters given it by law and take such actions as may, in the future, be required to prevent waste and protect correlative rights therein.

(30) That those matters or actions contemplated by Finding No. (29) above may include but are not limited to: well spacing, requiring wells to be drilled, requiring elimination of undeveloped or dry acreage from the unit area, and modification of the unit agreement.

(31) That the unit operator should be required to periodically demonstrate to the Commission that its operations within the unit

are resulting in prevention of waste and protection of correlative rights on a continuing basis.

(32) That such a demonstration should take place at a public hearing at least every four years following the effective date of the unit or at such lesser intervals as may be required by the Commission.

(33) That all plans of development and operation and all expansions or contractions of the unit area should be submitted to the Commission for approval.

(34) That in addition to the submittal of plans of development and operation called for under Finding No. (33) above, the operator should file with the Commission tentative four-year plans for unitized operations within the unit.

(35) That said four-year plan of operations should be for informational purposes only, but may be considered by the Commission during its quadrennial review of unit operations.

(36) That the initial four-year plan should be filed with the Commission within 60 days following the entry of this order, and that subsequent plans should be filed every four years within 60 days before the anniversary date of the entry of this order.

(37) That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area.

IT IS THEREFORE ORDERED:

(1)That the Bravo Dome Carbon Dioxide Gas Unit Agreement is hereby approved.

(2) That the plan contained in said unit agreement for the development and operation of the unit area is hereby approved in principle as a proper conservation measure; provided, however, that notwithstanding any of the provisions contained in said unit agreement, this approval shall not be considered as waiving or relinquishing, in any manner, any right, duty, or obligation which is now, or may hereafter be, vested in the Commission to supervise and control operations for the exploration and development of any lands committed to the unit and production of carbon dioxide gas therefrom, including the prevention of waste, and the protection of correlative rights.

(3) That the unit operator shall file with the Commission an executed original or executed counterpart of the unit agreement within 30 days after the effective date thereof; that in the event of subsequent joinder by any party or expansion or contraction of the unit area, the unit operator shall file with the Commission within 30 days thereafter counterparts of the unit agreement reflecting the subscription of those interests having joined or ratified.

(4) That the operator of said unit shall be required to periodically demonstrate to the Commission that its operations within the unit are resulting in the prevention of waste and protection of correlative rights on a continuing basis.

(5) That such demonstration shall take place at a public hearing held at least every four years following the effective date of the unit or at such lesser intervals as the Commission may require.

(6) That all plans of development and operation and all expansions or contractions of the unit area shall be submitted to the Commission for approval.

(7) That in addition to the submittal of plans of development and operation required under Order No. (4) above, the operator shall file with the Commission tentative four-year plans for unitized operations within the Bravo Dome Unit.

(8) That said four-year plan of operations shall be for informational purposes only, but may be considered by the Commission during its quadrennial review of unit operations.

(9) That the initial four-year plan shall be filed with the Commission within 60 days following the entry of this order, and that subsequent such plans shall be filed every four years within 60 days before the anniversary date of the entry of this order.

(10) That this order shall become effective 60 days after the approval of said unit agreement by the Commissioner of Public Lands for the State of New Mexico and the Director of the United States Geological Survey; that this order shall terminate ipso facto upon the termination of said unit agreement; and that the last unit operator shall notify the Commission immediately in writing of such termination.

(11) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ALEX J. ARMIJO, Member

s/Emery C. Arnold
EMERY C. ARNOLD, Member

s/Joe D. Ramey
JOE D. RAMEY, Member & Secretary

SEAL

STATE OF NEW MEXICO IN THE DISTRICT COURT

COUNTY OF TAOS

ROBERT CASADOS, et al.,
Plaintiffs,

-vs- CONSOLIDATED CAUSE NO. 81-176

OIL CONSERVATION COMMISSION, et al.,

MEMORANDUM DECISION

This is an appeal for a review from Orders No. R-6446 and R-6446-B of the Oil Conservation Commission of New Mexico, which approved in its Cause 6967 the proposed Bravo Dome Carbon Dioxide unit over the Tubb geological formation which contains marketable carbon dioxide gas. The plaintiff raises essentially three points for this appeal:

I. Is there substantial evidence to support the findings of the Commission? Plaintiffs challenge in their Petition whether substantial evidence exists on the record of Cause 6967 to support the findings of the Commission contained in the Orders objected to. Without repeating the totality of those findings, they are essentially to the effect that:

A. There is sufficient data to conclude as a geological probability the outer perimeters of the formation within the unitized area containing marketable carbon dioxide deposits;

B. There is insufficient data to conclude as a geological probability the location of the gas within the unitized area in order to determine the best method to protect the correlative rights of the parties and distribution of royalties but there exists sufficient data to determine the two best methods of such distribution.

C. Data can only be collected through exploration and development within the unitized area.

II. Do the findings support the conclusions included by the Commission in the protested Orders?

Appellants also argue that, even though sufficient evidence might exist to support the findings of the Commission, those findings do not support the conclusions of the Commission that:

A. The proposed unit is the best method to provide for orderly development of the gas deposit to prevent waste; and

B. The alternative methods for royalty determination to protect correlative rights set forth in the Orders are the best methods; and

C. The Commission's retaining of jurisdiction would protect the correlative rights of fee owners as development should continue.

III. Did the Commission have authority to approve the unit at its present stage of development?

The appellants were granted leave of the Court at oral argument to raise the issue of the constitutional and statutory authority of the Commission to approve the unit in the manner contemplated in the protested Orders. Specifically, the appellants argue that even though substantial evidence may exist before the Commission to sustain the findings in the Orders, and even though the conclusions should naturally flow from such findings, the Commission has no statutory or constitutional authority to approve what is a preliminary unit at a stage where the Commission concedes in its findings insufficient information exists to determine as a geological probability the actual location of marketable gas within the Tubb formation.

In reference to the above arguments, the Court, having heard the arguments of counsel, having read the transcripts of proceedings before the Commission, having read the briefs submitted by the parties, and otherwise being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. The plaintiffs are all owners of carbon dioxide property rights within the proposed unit area, either in Union, Quay or Harding Counties in New Mexico.

2. The defendant Oil Conservation Commission is a New Mexico regulatory agency empowered under Section 70-2-1 et. seq. to regulate and control production or handling of natural gas, oil,

and, in particular for this case carbon dioxide (Section 70-2-2 and Section 70-2-34 N.M.S.A., 1978 Comp.).

3. The primary mandate of the Commission is to prevent waste in developing natural resources, and in doing so, protecting the correlative rights of owners of land of minerals during exploitation of such natural resources.

4. The defendants Amoco Production Company, Amerada Hess Corporation and Cities Service Company are all foreign corporations licensed to do business in New Mexico and are holders of oil and gas (including carbon dioxide) leases within the area of the proposed unit and/or participants in the proposed unitization, with Amoco being the applicant before the Commission in Cause No. 6967.

5. The intervenor Commissioner of Public Lands and State Land Commissioner is the holder in public trust of fee title to substantial lands within the proposed unit and also is required by law to approve the unitization agreement as it should affect such lands.

6. The Petition to the defendant Commission arose out of agreements contained in oil and gas leases with fee owners of land, some of which are plaintiffs in this case, requiring review and approval of unitization agreements by the Commission. The effort to unitize in this case is therefore characterized as a voluntary unitization where all parties concede that land belonging to fee owners not part of such lease agreements is not included as part of the unit.

7. The transcripts of record before the Commission show that the following evidence was presented at hearing:

A. Adequate geological data to show that the Tubb formation is within the unitized area as a reasonable geological probability.

B. Inadequate geological data exists to show the various underground meanderings of the formation and therefore determine as a geological probability whether certain fee owners are or are not entitled to royalties because of the location of that formation, and in what distribution.

C. The data needed for such determination will occur during the very expiration and production contemplated within the challenged Commission's Orders and at which time much of the waste to protect against would likely occur.

D. The Commission was unable to determine which method of guarantee correlative rights would be best, because the information does not exist on which to reasonably calculate the best method at this time, and therefore alternative methods subject to subsequent review by the Commission were approved.

8. The Commission retained jurisdiction over the unit, to reasonably respond as information develops.

9. The Commission followed in all respects its rules required by Section 70-2-7 N.M.S.A., 1978 Comp.

Based on the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Substantial evidence exists on the record of proceedings before the New Mexico Oil Conservation Commission in Cause No. 6967 to support the findings of fact contained in Orders R-6446 and R-6446-B of that Commission.

2. The conclusions reached in those Orders by the Commission in approving the Bravo Dome unitization agreement are supported by the findings of fact.

3. The Commission acted within its authority in approving the preliminary unitization agreement set forth in its Orders and properly within its mandate to provide an opportunity for property owners to produce insofar as practicable to do so, without waste, a proportion of gas in the formation insofar as can practically be determined and obtained without waste. (See Continental Oil Co. v. Oil Conservation Commission, 70 NM 310, 373 P.2d 809 (1962).

4. The decision of the Oil Conservation Commission should be sustained.

5. The defendants in this case are entitled to their costs.

DONE BY THE COURT this 5th day of April, 1982.

s/Joseph E. Caldwell
DISTRICT JUDGE

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

ROBERT CASADOS, et al.,
Plaintiffs-Appellants,
-vs-
OIL CONSERVATION COMMISSION, et al.
Defendants-Appellees,
ALEX J. ARMIJO, Commissioner of
Public Lands,
Intervenor-Appellee

SUPREME COURT OF NEW MEXICO FILED NOV. 10 1983
s/Rose Marie Alderete

No. 14,359

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Joseph E. Caldwell, District Judge

DECISION

RIORDAN, Justice.

Robert Casados, et al (Appellants), petitioned the district court for review of the New Mexico Oil Conservation Commission (Commission) Orders R-6446 and R-6446-B. The district court upheld the orders of the Commission. On appeal, we affirm the district court.

The issue on appeal is whether the district court properly sustained the Commission's orders approving the Bravo Dome Carbon Dioxide Unit Agreement.

Amoco Production Company (Amoco) is the operator of the Bravo Dome Carbon Dioxide Gas Unit (Unit) which is a voluntary unit for the exploration and development of carbon dioxide gas from approximately 1,035,000 acres of federal, state, and fee lands located in Harding, Quay, and Union Counties, New Mexico. In forming the Unit, Amoco, a unit operator, submitted the Bravo Dome Carbon Dioxide Gas Unit Agreement (Unit Agree-

ment) to the New Mexico Commissioner of Public Lands and the Director of the United States Geological Survey for approval.

The New Mexico Commissioner of Public Lands gave preliminary approval of the Unit Agreement as to form and content, but pursuant to Rule 47 of the State Land Office Rules and Regulations, postponed his final decision pending action by the Commission. Amoco applied to the Commission for approval of the Unit, and after a Commission hearing, Order R-6446 was entered by the Commission approving the Unit. Final approval was then received from the New Mexico Commissioner of Public Lands and by the Director of the United States Geological Survey.

Thereafter, Appellants filed an application for rehearing asking the Commission to set aside Order R-6446, or, in the alternative, to enter additional findings on the questions of the prevention of waste and protection of correlative rights within the Unit area as afforded by the Unit Agreement, and to determine whether the Unit Agreement and its plan are premature.

On January 23, 1981, the Commission entered its Order R-6446-B, which again approved the Unit and which contained extensive findings on waste and correlative rights. The order also imposed certain conditions on unit operators, which, among other things, required periodic public hearings before the Commission, at which time Amoco would be required to show that unit operations will result in the prevention of waste and the protection of correlative rights. Under the order, Amoco is also required to periodically file with the Commission plans of development that may be considered by the Commission in its review of Unit operations.

Petitions to Appeal from Orders R-6446 and R-6446-B were filed in Harding, Quay and Union Counties. The petitions were consolidated and docketed in the district court of Taos County. After hearing, the district court entered judgment affirming the orders of the Commission. The district court found that Appellants are owners of carbon dioxide property rights within the proposed Unit area, that the Commission is a regulatory agency empowered to regulate the control production of handling carbon dioxide, and that the primary mandate of the Commission is to prevent waste in developing natural resources, and in doing so, to protect correlative rights of owners during exploration of those resources. Based upon its findings, the district court concluded that substantial evi-

dence exists to support the Commission's findings, and that the conclusions reached by the Commission in approving the Unit Agreement are supported by the findings of fact. The district court further concluded that the Commission acted within its authority in approving its mandate to provide an opportunity to produce, insofar as practicable, without waste, a portion of gas in the formation, and that the order and decision of the Commission should be sustained.

On appeal, Appellant's claim that the Commission's findings on waste and correlative rights are not supported by substantial evidence. We disagree. In reviewing the district court's order, we make the same review of the Commission's orders as did the district court, and are limited to considering "whether, as a matter of law, the action of the Commission was consistent with and within the scope of its statutory authority, and whether the administrative orders are supported by substantial evidence." Rutter & Wilbanks Corp., v. Oil Conservation Commission, 87 N.M. 286, 287, 532 P.2d 582, 583 (1975) (citations omitted).

In Continental Oil Co. v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962), and in Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975), this Court set forth the standards to be applied when the sufficiency of the findings of an order of the Commission are at issue. In Fasken, 87 N.M. at 294, 532 P.2d at 590, this Court specifically held that the Commission order must contain "[s]ufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings (on waste and correlative rights). In Continental, it was said that although elaborate findings are not necessary, nevertheless '. . . Administrative findings by an expert administrative commission should be sufficiently extensive to show. . .the basis of the Commission's order.' Id. at 321, 373 P.2d at 816." Thereafter, in Grace, II. v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 532 P.2d 939 (1975), this Court defined the scope of review of an order of the Commission stating that it will review the order to determine if it is substantially supported by the evidence and by applicable law. "'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 208, 532 P.2d 942 (citation omitted).

Finally, in determining whether a finding is supported by substantial evidence, this Court reviews the evidence in the light most favorable to support the findings. See Tapia v. Panhandle Steel Erectors Co., 78 N.M. 86, 89, 428 P.2d 625, 628 (1967).

Waste.

In Continental Oil Co., 70 N.M. at 318, 373 P.2d at 814, (emphasis added) (citation omitted), we held that:

> The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and to protect correlative rights. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights.

In defining "waste," NMSA 1978, Section 70-2-3 (emphasis added), provides in pertinent part that:

> As used in this act the term 'waste,' in addition to its ordinary meaning, shall include:
>
> A. 'underground waste' as those words are generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas;
>
> B. 'surface waste' as those words are generally understood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of natural gas of any type or in any form or crude petroleum oil, or any product thereof, but including

the loss or destruction, without beneficial use resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells, or incident to or resulting from the use of inefficient storage or from the production of crude petroleum oil or natural gas in excess of the reasonable market demand[.]

This definition of "waste" extends to carbon dioxide gas as well as natural gas. NMSA 1978, Section 70-2-34.

Commission's findings Nos. 8 and 9 of Order R-6446-B reflect the Commission's reasoning in reaching its conclusion that the approval of the Unit will tend to increase the total quantity of carbon dioxide ultimately recovered from the Unit area thereby preventing underground surface waste.

Finding No. 8 provides in part:

That the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease by lease basis:

(a) more efficient, orderly and economic exploration of the unit area; . . . .

The record contains substantial evidence to support this finding. Witnesses for Amoco, Cities Services Company, and Appellants testified that unitized operation and management was the best method to be used to develop this field. Furthermore, the evidence shows that unit management will provide for orderly development of the Unit area, and will permit the operator of the Unit to develop the area by drilling wells at the most desirable location, thereby enabling the operator to drain the reservoir in an effective manner with the most efficient spacing pattern. The evidence also substantiates that unit management will avoid wasteful drilling and completion practices since the operator will drill only those wells necessary to produce the reserves. Finding No. 8 further provides that another advantage of unitized operation and management is that it will result in: "more economical production, field gather-

ing, and treatment of carbon dioxide gas within the unit area."

In view of the evidence, finding No. 9 provides:

> That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

A review of the record indicates that Order R-6446-B contains extensive and proper findings sufficient to show the Commission's reasoning that unitization operation and management of the Unit area would prevent waste. The Commission's findings reflect the Commission's reasoning that unitized managment and operation of the Unit area was a more efficient method and that it would result in economic savings which would extend the economic lives of the wells involved. This, the Commission found, will lead to the production of carbon dioxide gas that otherwise would not be produced. This prevents waste. Therefore, we determine that the Commission's findings are supported by substantial evidence.

Correlative Rights.

"Correlative rights" are defined in NMSA 1978, Section 70-2-33(H) (Cum. Supp. 1983), as:

> [T]he opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practicably determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy [.].

In Continental, this Court initially stated that "the protection of correlative rights must depend upon the [C]ommission's findings as to the extent and limitations of the right." Id. at 324, 373 P.2d at 818. The strict test announced in Continental concerning correlative rights findings was again reviewed by this Court in Rutter, which involved an attack on an Oil Conservation Commission

order approving oversized proration units for failing to contain all findings on correlative rights required by the Continental decision. In announcing our decision in Rutter, we stated:

> When the Commission exercises its duty to allow each interest owner in a pool 'his just and equitable share' of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights. . . is subject to the qualification as far 'as it is practicable to do so.' While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet unobtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not constitute 'substantial evidence' or that the orders were improperly entered or that they did not protect the correlative rights of the parties 'so far as [could] be practicably determined. . . .'

Id. at 292, 532 P.2d at 588 (citations omitted) (emphasis added).

In the present case, there is substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected. The only limitations on the evidence presented arises from the very nature of exploratory units in that certain evidence is not obtainable until the acreage involved has been more fully developed.

Commission Finding No. 14 provides:

> (14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:
>
> (a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

This finding is supported by the testimony of expert witnesses.

In its finding No. 15, the Commission concluded that each of the methods of participation described in finding No. 14 "was demonstrated to have certain advantages and limitations." An expert witness for Amoco testified that when it was learned where productive acreage within the Unit was located, the Unit Agreement had a built-in provision to correct these inequities, and that there could be problems with the participating area approach, if there are obligations outside of the area that destroy the concept of orderly and efficient development. Another expert witness testified that the participating area approach was better than a straight acreage approach although it may not be as precise a tool to protect correlative rights as one based on recoverable reserves.

Commission findings Nos. 17, 25, and 37 provide:

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for the development of the unit area in a method that will serve to prevent waste and which is fair to the owners of the interest therein.

(37) That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area.

Order R-6446-B contains the necessary findings which cover correlative rights pursuant to our requirements of Continental and Rutter. Although there is conflicting evidence, we cannot say that the exhibits, statements, and testimony of expert witnesses do not constitute "substantial evidence." On the contrary, the record contains substantial evidence to support the Commission's order.

Voluntary Unitization

There is a distinction between voluntary unitization and forced or compulsory unitization. Voluntary unitization is a contractual agreement among parties for the purpose of primary or secondary production of resources. Forced or compulsory unitization is usually a statutory proceeding to compel nonconsenting interest owners to unitize acreage for purposes of secondary or enhanced recovery. See generally, 6 H. Williams & C. Meyers, Oil and Gas Law, §§ 910 through 948 (1981). New Mexico's Statutory Unitization Act, NMSA 1978, Sections 70-7-1 through 70-7-21 (Unitization Act), is an example of forced or compulsory unitization. However, the Unitization Act does not apply to the situation presented in this appeal. It applies to secondary and tertiary recovery projects, not to voluntary exploratory units for primary production such as that proposed in the Bravo Dome Unit. §70-7-1. The procedures to be followed in compulsory unitization, given its involuntary and adversarial nature, must provide safeguards and protection for nonconsenting interest owners. Thus, because of the adversial nature of the proceeding, the Commission must determine whether the participation formula for unitization is fair, reasonable, and equitable to both consenting and nonconsenting parties.

The elements of conflict and adversity between the parties are simply not present in voluntary unitization. Because such unitization is affected by negotiation and agreement of the parties, there is no conflict which the court must resolve. The parties themselves have mutually agreed as to how their correlative rights will be protected. In a voluntary unit, only those who have committed to the unit are affected. The very nature of voluntary unitization assures that the correlative rights of the parties are protected. The correlative rights of those not committed to the unit exist independently

of the unit and are otherwise protected by the lease agreements.

The correlative rights of noncommitted owners are not an issue in the present case. A review of the record indicates that the proposed Unit is wholly voluntary. No one can be compelled to join it. The Unit Agreement therefore provides for allocation of produced carbon dioxide on a straight acreage basis, regardless of the actual production on any tract within the Unit.

Conclusion

After reviewing the record, we determine that because of the very nature of the technical subject matter it regulates, the Commission was not premature in the manner in which it deliberated and made its decision to approve the Unit Agreement. It is within the authority of the Commission to consider its orders on the basis of preliminary data where appropriate. The record further indicates that the Unit Agreement will indeed serve to prevent waste and protect the correlative rights of the interest owners in the Unit area. Therefore, the judgment of the district court and the orders of the Commission are affirmed. Each of the parties shall bear their respective costs.

This case is not to be published nor cited as precedent.

IT IS SO ORDERED.

s/William Riordan
WILLIAM RIORDAN, Justice

WE CONCUR:

s/H. Vern Payne
H. VERN PAYNE, Chief Justice

s/Dan Sosa, Jr.
DAN SOSA, JR., Senior Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMOCO PRODUCTION COMPANY,
Plaintiff and
Counterdefendant,

-vs- Civil No. 84-1430-JB

J. CASPER HEIMANN, et al.,
Defendants and
Counterclaimants,

COURT'S FINDINGS OF FACT AND CONCLUSION OF LAW

THE COURT having independently adduced evidence during the trial of this matter on November 30 and December 1, 2, 3, 4, 7, 8, 9, 10, 11 and 14, 1987, and without considering the jury verdict in favor of counterclaimants, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Amoco Production Company, hereinafter referred to as "Amoco," is a foreign corporation authorized to do business in New Mexico; that defendants and counterclaimants are residents of the State of New Mexico; and the matters in controversy exceed the sum of $10,000.00, exclusive of interest and costs.

2. This is an action for declaratory relief on the part of Amoco and for declaratory and injunctive relief on the part of the counterclaimants based upon three mineral leases.

3. The leases which are the subject of this action are as follows:

(a) Oil and Gas Mineral Lease from Fred P. Heimann, et al., lessors, to Amoco Production Company, lessee, dated May 21, 1971, covering approximately 39,420 mineral acres;

(b) Oil and Gas Mineral Lease from James D. Price and

Joanne Price, lessors, to Amoco Production Company, lessee, dated April 9, 1974, covering approximately 1,011 mineral acres (subsequently assigned to Counterclaimants Johnann and Bobby Adee as lessors); and

(c) Oil and Gas Mineral Lease from Gertrude Roberts, lessor, to Amoco Production Company, lessee, dated June 3, 1971, covering approximately 640 mineral acres (subsequently assigned to Counterclaimants Van Robertson and Deana Shugart and their respective spouses, as lessors).

4. Each of the leases contained a unitization clause which provides:

> Lessee also shall have the right to unitize, pool or combine all or any part of the above described lands with other lands in the same general area by entering into a cooperative or unit plan of development or operation approved by any governmental authority and, from time to time, with like approval, to modify, change or terminate any such plan or agreement and in such event the terms, conditions and provisions of this lease shall be deemed modified to conform to the terms, conditions and provisions of such approved cooperative or unit plan of development or operation, and particularly, all drilling and development requirements of this lease, express or implied, shall be satisfied by compliance with the drilling and development requirements of such plan or agreement, and this lease shall not terminate or expire during the life of such plan or agreement. In the event that said above described lands or any part thereof, shall hereafter be operated under any such cooperative or unit plan of development or operation whereby the production therefrom is allocated to different portions of the land covered by such plan, then the production allocated to any particular tract of land shall, for the purpose of computing the royalties to be paid hereunder to Lessor, be regarded as having been produced from the particular tract of land to which it is allocated and not to any other tract of land; and the royalty payments to be made hereunder to Lessor shall be based upon production only as so allocated. Lessor shall formally express Lessor's consent to any cooperative or unit plan of development or operation adopted

by Lessee and approved by any governmental agency by executing the same upon request of Lessee.

5. The unitization clause imposed an implied duty to Amoco to act fairly and in good faith, with due regard for the counterclaimants' interests and to provide for a fair apportionment of the carbon dioxide gas produced.

6. Amoco implemented the unitization clause in May 1979 by committing the counterclaimants' leases and mineral lands to a unit plan of development consisting of approximately 1,036,000 acres in Harding, Union and Quay Counties, New Mexico, designated as the "Bravo Dome Unit," under a unit plan of development contained in a document entitled "Unit Agreement-Bravo Dome Carbon Dioxide Gas Unit-Union, Harding, and Quay Counties, New Mexico;" that each of the counterclaimants' original mineral leases expressly provided that the counterclaimants would be paid a one-eighth royalty interest on all carbon dioxide gas actually produced from the leased lands in accordance with the mineral ownership of the lands.

7. One of the reasons Amoco unitized counterclaimants' lands was to ensure that the mineral leases with Amoco did not expire according to their terms.

8. Counterclaimants consistently refused, and continue to refuse, to consent to or ratify Amoco's Unit Agreement.

9. The Unit Agreement which was deemed to modify the mineral leases, committed the counterclaimants mineral interests to a tract participation formula by which the counterclaimants were to participate in royalties from the unit production revenues in proportion to the ratio that the net mineral estate under the surface acres of counterclaimants' land bears to the total 1,036,000 acres in the Bravo Dome Unit.

10. The tract participation formula gave no consideration to material variations in the reservoir characteristics nor to material differences in the volume of carbon dioxide gas in place beneath the counterclaimants' lands as compared with other lands within the unit.

11. At the time of the unitization, Amoco had evaluated the geological data of the unit and had determined that the highest net pay

values occurred in the eastern and southeastern portion of the unit, the location of counterclaimants' lands, and that the net pay values decreased towards the western and northern portions of the unit; that the evaluation of reservoir engineering reflected that the higher values of gas in place were to be found in that portion of the reservoir encompassing counterclaimants' mineral lands.

12. Amoco failed and refused to provide counterclaimants with information which would permit their meaningful participation and permit their input into the Unit Agreement, including the tract participation formula.

13. Amoco failed and refused to explain to counterclaimants the significance of Amoco's geological and engineering information so as to permit counterclaimants to make an informed assessment of the adequacy and fairness of the tract participation formula.

14. Amoco knew, or should have known, that the royalty income to the counterclaimants under the tract participation formula would be substantially unfair and highly disadvantageous to the counterclaimants.

15. Under the tract participation formula, counterclaimants were paid on a 3.6% allocation although the gas in place under counterclaimants' mineral land was 8.1%.

16. From its detailed geological and reservoir engineering studies, Amoco knew that the lands of the counterclaimants had significantly superior reservoir qualities and significantly greater volumes of carbon dioxide gas in place compared with other portions of the unit area.

17. In spite of Amoco's knowledge of the reservoir characteristics, Amoco failed to disclose to counterclaimants the material geological and engineering facts known to it concerning the productive superiority of counterclaimants' lands and the significance and importance of these facts in properly assessing the fairness of the unit tract participation formula.

18. In a similar situation in 1955, Amoco had implemented a royalty participation in the La Blanca Field Unit in Hidalgo County, Texas, on a straight acreage basis; that Amoco subsequently revised the participation to an adjusted acre feet basis when it determined that the straight acreage basis was inequitable to the royalty owners; that in the instant case, although it knew that

the tract participation formula was inequitable to the counterclaimants, Amoco failed to present for counterclaimants' consideration any alternative method of royalty allocation consistent with Amoco's duty to act fairly, in good faith, and with due regard for counterclaimants' interests.

19. Although Amoco was aware that counterclaimants refused to execute the Unit Agreement because of their lack of information and knowledge, Amoco failed and refused to disclose its geological information regarding the reservoir characteristics, despite frequent meetings with the counterclaimants at which counterclaimants expressed their concern over their lack of detailed information regarding the gas in place under their lands.

20. At all times Amoco possessed a superior economic position and relative bargaining strength in its dealings with counterclaimants; that Amoco refused to pay payments properly due to counterclaimants in an attempt to coerce counterclaimants to ratify the Unit Agreement.

21. By its conduct as described above, Amoco materially breached its implied duty to counterclaimants to exercise the unitization authority granted under section seven of counterclaimants' leases and to act in good faith, fairly and with due regard for counterclaimants' interests.

22. The unitization provision in counterclaimants' leases is subject to implied terms that will prevent arbitrary and unreasonable dealings and imposes a rigid standard of good faith on the part of Amoco.

23. To the date of the filing of this action, counterclaimants were without full knowledge of the facts known to Amoco regarding the superior reservoir qualities and estimated volumes of carbon dioxide gas in counterclaimants' mineral lands and of the fact that Amoco expected counterclaimants' lands to produce carbon dioxide gas at a rate higher than the average overall performance of the unit.

24. The fact that Amoco obtained the approval of the New Mexico Oil Conservation Division does not establish that the Unitization Agreement and the tract participation formula was fair to counterclaimants.

25. The fact that the Unit Agreement comprised many individual tracts which were leased by multiple lessors did not

relieve Amoco of its duty to make all geological and geophysical information known to counterclaimants in order to permit them to protect their own interests and to participate in a fair development plan.

26. The attendance of counterclaimants, or their representative, at the Oil Conservation Division hearings on the unitization plan were of little consequence since they were lay people and uninformed regarding the complex geological characteristics of the reservoir.

27. Absent declaratory and injunctive relief, counterclaimants will sustain irreparable harm in the future for which there is no adequate or complete remedy at law.

Conclusions of Law

1. The Court has jurisdiction of the parties to, and the subject matter of, this action.

2. The relationship between Amoco and counterclaimants was analogous to that of principal and agent so that Amoco owed counterclaimants the duty to exercise a high degree of good faith and loyalty for the furtherance and advancement of the interests of counterclaimants.

3. Under the relationship between Amoco and counterclaimants, Amoco is required to insure that counterclaimants possessed full knowledge of all facts involving their mineral interests before Amoco could act adversely to the interests of counterclaimants.

4. Amoco had the duty to implement a plan of allocation by which counterclaimants would receive fair and just compensation for the carbon dioxide gas extracted from their mineral lands.

5. Amoco was bound by implied covenants in the lease to implement a fair unitization plan if unitization was to be effected; that it was under a duty to act fairly and in good faith with due regard for the counterclaimants' interests.

6. Amoco breached its implied duty to act in good faith, fairly and with due regard to the counterclaimants' interests as well as its own.

7. The fact that the Unit Agreement comprised many individual tracts which were leased by multiple lessors did not relieve Amoco of its duty to make all geological and geophysical information

known to counterclaimants in order to permit them to protect their own interests to participate in a fair development plan.

8. The fact that the New Mexico Oil Conservation Division approved the unitization plan was not dispositive of whether the unitization plan was fair to counterclaimants.

9. The unitization of counterclaimants' lands by Amoco was undertaken in bad faith and is accordingly declared to be void and of no legal effect; that judgment be entered for counterclaimants declaring that Amoco's purported unitization of counterclaimants' leases was void and of no force and effect; and that judgment be entered terminating the purported unitization of counterclaimants' leases and enjoining Amoco to pay royalties to counterclaimants in the future for production attributable to the counterclaimants' lands in accordance with the terms of their leases with Amoco.

10. The express and implied obligations of Amoco to counterclaimants under the latter's mineral leases, including the duty to pay royalties pursuant to the provisions of those leases, are neither modified nor affected in any manner by the Unit Agreement.

11. The mineral leases between Amoco and counterclaimants are binding and enforceable according to their original terms.

12. Amoco shall be enjoined to pay royalties to counterclaimants in the future on a timely basis for production attributable to counterclaimants' mineral lands in accordance with the provisions of counterclaimants' mineral leases.

13. Amoco's complaint for declaratory judgment will be denied.

s/Juan G. Burciaga
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AMOCO PRODUCTION COMPANY, Plaintiff-counter-defendant- Appellant, Cross-Appellee, -vs- J. CASPER HEIMANN, OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; HOWARD W. ROBERTSON; PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE; DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNN HEIMANN; JAY DEE HEIMANN; GENE ALVIN HEIMANN; RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; JOHNANN ADEE, in her capacity as Personal Representative of the Estate of Fred P. Heimann, deceased, Defendants-counter-claimants- Appellees-Cross-Appellants, --- ROCKY MOUNTAIN OIL AND GAS ASSOCIATION; NEW MEXICO OIL & GAS ASSOCIATION Amici Curiae.	)	Nos. 88-2070 88-2072 88-2055 88-2355

APPENDIX G

ORDER

Filed May 24, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, Circuit Judges, and THEIS, District Judge.*

*Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

On consideration of defendants' petition for rehearing and the response to it, we simultaneously with this order file an amended opinion. In all other respects the petition for rehearing is denied.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By s/Patrick Fisher

Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AMOCO PRODUCTION COMPANY,	)	
	)	
Plaintiff-counter-defendant-Appellant, Cross-Appellee,	)	
	)	
-vs-	)	Nos. 88-2070
	)	88-2072
J. CASPER HEIMANN, OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; HOWARD W. ROBERTSON; PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE; DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNN HEIMANN; JAY DEE HEIMANN; GENE ALVIN HEIMANN; RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; JOHNANN ADEE, in her capacity as Personal Representative of the Estate of Fred P. Heimann, deceased,	)	88-2055
	)	88-2355
	)	
Defendants-counter-claimants-Appellees-Cross-Appellants,	)	
	)	
ROCKY MOUNTAIN OIL AND GAS ASSOCIATION; NEW MEXICO OIL & GAS ASSOCIATION	)	
	)	
Amici Curiae.	)	

APPENDIX H

ORDER

Filed June 12, 1990

Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS*, District Judge.

*Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

The court has for consideration in the captioned cases:

1. Appellees' second petition for rehearing;
2. Appellees' motion to stay the mandate, together with appellant's response and appellees' reply; and
3. Appellant's motion to include instructions concerning interest in the mandate, together with appellees' response.

Upon consideration whereof, the court denies appellees' second petition for rehearing.

The court also denies appellees' motion to stay the mandate, and directs the clerk to issue the mandate forthwith.

Finally, the court denies appellant's motion to include instructions concerning interest in the mandate. This denial is without prejudice to the appellant's right to bring the issue of interest before the district court when that court enters judgment in favor of the appellant, Amoco Production Company, pursuant to this court's mandate.

Entered for the Court

s/Robert L. Hoecker
ROBERT L. HOECKER, Clerk